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POLITICAL EXPRESSION IN THE MILITARY: A "DUE PROCESS" METHODOLOGY

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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April 1988

POLITICAL EXPRESSION IN THE MILITARY:
A "DUE PROCESS" METHODOLOGY

ABSTRACT: This thesis explores the right of political expression in the military. Although that form of expression resides at the core of the first amendment, unique governmental interests warrant substantial curtailment of soldiers' involvement in partisan political activity. Indeed, Supreme Court decisions dealing with the public employment relationship in general, and with political expression in the federal workplace in particular, indicate that the soldier's right to political expression is entitled to due process rather than first amendment protection.

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I
INTRODUCTION

Among the issues raised by American military involvement in Vietnam, few remain more intractable than the problem of accommodating the "tension between individual liberty guaranteed by the Bill of Rights and the demands of our armed services in carrying out their vital mission."[1] Although there was "little concerted political dissent in the armed forces during World War II,"[2] the military ranks of the United States "did not long remain insulated from the winds of dissent"[3] which began agitating the nation during the 1960s. Indeed, the Vietnam conflict marked the first instance in American military history in which a "significant number of politically hostile individuals"[4] entered the armed forces. These new soldiers "shared the contemporary willingness to attack entrenched authority in the federal courts,"[5] and as a result "military practices that had gone without effective judicial scrutiny since the founding of the Army were subject to serious constitutional challenges" by the early 1970s.[6]

Because of the first amendment's[7] "preferred position"[8] within the hierarchy of constitutional rights, the tension between individual liberty and military necessity is greatest when the soldier's freedom of speech is implicated. This tension is especially severe when military regulations restrict the soldier's right to engage in conventional political expression. While that variety of speech resides at the core of the first amendment,[9] it also threatens the military's traditional political neutrality, and thereby invokes governmental interests which other forms of expression do not.

This article attempts to define the right of political expression in the military. Its thesis is that a precise definition of this right can be achieved only by analyzing several related but discrete historical principles and areas of the law, and that such an analysis reveals that the soldier's right to political expression is of due process rather than first amendment proportions. The first portion of the article presents an overview of first amendment principles pertaining to political expression, and identifies several aspects of political expression which are relevant to the problem of delimiting the dimensions of that right in the military setting.

The article then considers a series of historical doctrines which provide a necessary framework for applying constitutional principles in the military community. The article next discusses current restrictions on political expression in the military. In an attempt to ascertain the degree of constitutional protection which courts should accord political expression in the military, the article then analyzes the Supreme Court's public forum doctrine and its cases involving constitutional issues arising within the public employment context. Finally, the article addresses the various standards of review which federal courts have employed in assessing constitutional claims arising within the military, and proposes that future issues involving conventional political expression in the military be reviewed using a rational basis test.

II
THE FIRST AMENDMENT AND POLITICAL EXPRESSION: AN OVERVIEW

Because the Supreme Court generally "measures the value of speech according to how it promotes the goals of a democratic political system,"[10] the scope of first amendment protection accorded conventional political activities is broad. Thus, although the Court has not subsumed the individual's right to vote[11] and to run for political office[12] under the first amendment, it has acknowledged that citizens enjoy a first amendment right to "act as a party official or worker to further [their] own political views."[13] The Court has also recognized the first amendment status of various forms of expression which the furtherance of political views may assume, including participating at political conventions[14], canvassing door-to-door,[15] contributing[16] or soliciting[17] money, distributing literature,[18] picketing,[19] and peacefully[29] demonstrating.[21]

Two characteristics of conventional political expression are especially relevant in defining the dimensions of that right within the military context. First, the practice of acting with others rather than independently is "deeply embedded in the American political process" because "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost."[22] Although not mentioned in the Constitution, the freedom of association for political purposes has

been described as "perhaps the most significant individual right Americans enjoy,"[23] and the Court has long regarded it as "implicit in the freedoms of speech, assembly, and petition."[24] The effectiveness of collective expression as a medium for communicating ideas earned the practice its cherished position within the first amendment hierarchy; that same quality, however, poses a risk to military discipline, since soldiers are more likely to resist authority when they perceive that they are joined by others.[25]

Another characteristic of conventional political expression which bears on the problem of fixing the limits of that right in the military context is apparent in the variety of forms which political expression assumes: rarely will political expression be confined to what the Court describes as "pure speech;"[26] instead, such expression is often manifested as communicative conduct, in which "speech" and "nonspeech" elements join.[27] Under these circumstances, a "sufficiently important governmental interest in regulating the nonspeech element justifies incidental limitations on First Amendment freedoms."[28]

III
APPLYING THE FIRST AMENDMENT TO THE MILITARY: DOCTRINAL CONSIDERATIONS

Introduction: Applicability of "Civilian" Constitutional Principles

Notwithstanding persuasive evidence that the founding fathers "envisioned a limited, if not non-existent, role for the first amendment in the armed services,"[29] and early Supreme Court cases suggesting that military personnel were bereft of any protection under the Bill of Rights,[30] the Court of Military Appeals recognized the first amendment's applicability to the Armed Forces in one of its earliest decisions,[31] and military courts now accept the premise that "the Bill of Rights applies with full force to men and women in the military service unless any given protection is, expressly or by necessary implication, inapplicable."[32] Although *Parker v. Levy*[33] provided the first forum in which the Supreme Court held that soldiers are specifically entitled to first amendment protection,[34] lower federal courts,[35] a Senate subcommittee,[36] and senior officials of the Departments

of Defense[37] and the Army[38] had previously reached the same conclusion. While the proposition that servicemen as well as civilians enjoy free speech rights is no longer open to debate,[39]however, the precise dimensions of the serviceman's first amendment right remain ambiguous.[40] The right is absolute in neither the military nor civilian contexts,[41] and the serviceman's free speech rights are not coextensive with those of his civilian counterpart.[42]

Indeed, although some commentators argue that an analysis of the first amendment's applicability to the military should stem from the premise that the defense establishment is indistinguishable from any other government agency,[43] or that soldiers need broader constitutional protection than civilians because they comprise a "captive audience" subject to the "Army's system of indoctrination and regimentation and controls,"[44] courts generally recognize that first amendment freedoms must be circumscribed in the military context.[45] The narrowness of this circumscription occasionally prompts criticism,[46] and courts sometimes appear constrained to emphasize that the factors which justify a restrictive interpretation of constitutional rights in the military do not eliminate those rights alltogether.[47]

The Doctrine of Military Necessity

Judicial unwillingness to accord full first amendment protection to soldiers stems from the military's unique role in the democratic political system and the nature of its relationship to the civilian branches of government.[48] Because its "primary business" is "to fight or be ready to fight wars should the occasion arise,"[49] the military must preserve within its ranks a degree of loyalty, discipline and morale sufficient to enable success on the battlefield; the unrestrained exercise of first amendment rights would jeopardize that mission.[50] Further, restrictions on free speech within the military help preserve the political neutrality of, and civilian control over, the armed forces.[51] Both concepts are fundamental to democratic government.[52]

In *Burns v. Wilson,* [53] the Supreme Court recognized that a soldier's right to free expression is subordinate to the nation's interest in an effective

military; the Court concluded that the "rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[54] These demands, and the unique mission which render them paramount, underlie the Court's later description of the military as a society which is "by necessity . . .specialized [and] separate from civilian society."[55] As its traditional values[56] of uniformity, order, loyalty and discipline suggest, the military must be regarded as a "separate society" in first amendment analysis because the democratic procedures which imbue the civilian society--including the principle of freedom of expression-- are to some extent incompatible with military organizations and activities.[57] This incompatibility, of course, does not mean that constitutional safeguards may be extinguished within the armed forces; it means only that different rules must be applied to soldiers.[58]

This recognition that, within the military, an appropriate accommodation of individual and societal interests demands a different application of constitutional principles underlies the doctrine of military necessity.[59] A precursor to judicial development of the doctrine may be found[60] in Alexander Hamilton's Twenty-third Federalist, which warns that the "circumstances that endanger the safety of nations are infinite" and urges that a correspondingly broad degree of deference attend the formulation of policies affecting the armed forces.[61] Nearly a century ago, in a passage which emphasizes the fundamental difference between citizen and soldier by describing the uncompromising expectations which the latter must meet, the Supreme Court foreshadowed the judicial deference which is the chief manifestation of the military necessity doctrine:[62]

> By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties. . .[The army] is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So,

> unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.

Sixty-three years later, the Court underscored its deferential approach to the military with stronger and better known language in *Orloff v. Willoughby*.[63]

In its modern decisions, the Court has repeatedly asserted that the military's responsibility to defend the nation entitles it to insist upon an unparalleled degree of discipline.[64] These decisions indicate that the Court's unwillingness to intervene in military affairs rests on its acknowledgement of the military's peculiar disciplinary structure, its apprehension that applying civilian constitutional principles will disrupt that structure, and its lack of confidence in supplanting military decisions with its own accommodation of competing interests. Because of its importance within the armed forces and its concomitant role in shaping judicial attitudes toward the military,[65] the concept of discipline must be understood before the soldier's right to political expression can be properly defined.

Any discussion of military discipline must proceed from an awareness, shared by courts[66] and generals[67] alike, that the quality is a prerequisite to victory in war. Indeed, it is the indispensability of discipline which supports its designation by courts as a compelling state interest sufficient to justify limitations on fundamental freedoms.[68] Examination of the military's own definition of discipline,[69] along with treatments of the subject by military analysts,[70] social scientists[71] and academicians[72] reveals five key characteristics of discipline which illuminate the military interests to be preserved by a responsible theory of political expression in the armed forces.

First, discipline is not an inherent human quality; instead, it is the product of training which soldiers must undergo *before* they confront their enemy on the battlefield.[73] Second, discipline must enable soldiers to immediately, reflexively obey even those orders which conflict with their basic survival instincts.[74] Third, discipline must be founded on a respect

for and loyalty to authority.[75] Fourth, because it involves voluntary subordination of individual interests and judgment to the unit's interest and the judgment of superiors, discipline must be nurtured by applying principles of teamwork.[76] Finally, although it is "developed by leadership, precept, and training,"[77] discipline is effected by every facet of military life.[78]

One conclusion which can be drawn from these aspects of discipline is that the military's interest in attaining and preserving that state of readiness is not suspended during peacetime. Because discipline results from continual training, distinctions in the level of protection accorded soldiers' political expression should not turn on the presence or absence of war.[79] In addition, the fact that discipline is a learned attribute illustrates the military leader's crucial role in developing discipline among subordinates. The importance of this role explains traditional judicial deference to the expertise of military leaders: their active involvement in teaching discipline justifies a presumption that they are best equipped to understand and achieve military goals, and the substitution of an improper judicial "solution" for a military leader's decision entails an unacceptable risk.

The fact that discipline exists only when soldiers are conditioned to reflexively obey orders under all circumstances suggests that compliance--even with arbitrary regulations--has intrinsic value to the military, quite apart from whatever interest the regulation is designed to further.[80] The intrinsic value of compliance for its own sake should be considered in determining whether and to what extent the military must proffer extrinsic evidence to justify a challenged regulation or show how violations affect military interests.

Further, the applicability of teamwork principles to the problem of teaching soldiers to subordinate individual desires in deference to military needs demonstrates that the armed forces value uniformity because that attribute encourages discipline. Presumably, such subordination is facilitated by measures--such as uniform regulations-- which emphasize the homogeneity of the separate society to which the soldier belongs.[81] Finally, the fact that each facet of the military milieu affects discipline

suggests that courts should be cautious about applying usual constitutional principles even to issues which involve ostensibly "civilianized" aspects of the armed forces and bear no apparent relation to the military mission. Because all aspects of military society are interrelated,[82] such an approach may result in unforeseen damage to readiness.

National Security

Although a full discussion of the extent to which national security affects first amendment rights[83] is beyond the scope of this article, some observations are in order because of the close relationship between national security and the doctrine of military necessity. As a government interest which may be invoked in support of restrictions on free speech, national security is relevant to military necessity in two respects. First, both concepts embody the same compelling interest in preserving the nation--an objective, of course, which is a prerequisite to preserving all national liberties.[84] Second, because of the military's unique mission, national security issues are more likely to arise within that society than elsewhere.

Although the "government's interest in protecting national security is undeniably significant,"[85] it does not license broad suspensions of first amendment protections. Thus, the Supreme Court declines to recognize a "national security" exception to the prohibition of prior restraints unless disclosure of the speech in question will "surely result in direct, immediate, and irreparable damage to our Nation or its people."[86] While the narrowness of this exception may simply reflect the heavy burden of presumed unconstitutionality which, in first amendment lexicon, attends all prior restraints,[87] the Court in another context has resisted government arguments urging talismanic application of the doctrine as justification for limiting constitutional protections:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the

> most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties--the freedom of association--which makes the defense of the Nation worthwhile.[88]

Consistent with this view, lower federal courts have held that the government's unsupported invocation of national security is insufficient to warrant encroachments of constitutional rights.[89]

The Court addressed the endangerment of national security through disclosure of government secrets in *Snepp v. United States.*[90] Recognizing a "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service,"[91] the Court held that the first amendment does not prevent the government from pursuing a civil action for recovery of profits from the unauthorized publication of a book by a Central Intelligence Agency employee who had signed an agreement prohibiting disclosures about Agency matters without prior approval.

The case does not demarcate principles for resolving conflicts between national security and government employees,[92] but lower federal courts cite *Snepp* in support of the proposition that "secrecy agreements" executed as a condition of employment provide a constitutional basis for censoring unauthorized publications by employees.[93] The Circuit Court of Appeals for the District of Columbia has concluded that *Snepp* "sheds light on a broader principle of first amendment law," which provides that "a citizen's right of free expression of confidential information received directly from the government is not unfettered. . .and must be balanced against the government's legitimate interest in controlling the use of information it dispenses."[94] This principle does not extend to material which is unclassified or already in the public domain, because under those circumstances neither national security nor any "special relationship of trust with the government" can be invoked as a countervailing interest warranting restrictions on free speech.[95]

The concept of national security, in sum, although judicially acknowledged as a weighty interest, will not enable the government to abridge first amendment protections such as the prohibition of prior restraints merely be reciting that security interests are implicated. Particularly in contexts which do not directly involve peculiarly military matters, courts require the government to present evidence substantiating the claimed interest.[96] Indeed, the disparity between courts' treatment of claims of national security in cases which also involve internal military affairs, and their treatment of national security claims which do not directly involve such affairs suggests that the judicial deference traditionally accorded the armed forces is rooted in more than the military's unique role in providing for national defense. Finally, *Snepp* and its progeny indicate that an individual's employment relationship with the government is a critical factor in assessing that individual's first amendment rights.

The Military's Tradition of Political Neutrality

Unlike the principle of civilian supremacy over the military, which enjoys constitutional stature[97] and unambiguous historical acceptance,[98] the concept that armed forces should remain politically neutral is more difficult to document.[99] A discussion of the matter in a series of letters published in the *Army and Navy Chronicle* during 1836 suggests that most officers saw no need to avoid participation in political affairs.[100] Proponents of this view held up as an example the composition of the Revolutionary Army, in which, they argued, "[e]very officer. . .was also a politician."[101] Soon after the Civil War, attitudes within the officer corps changed to the extent that "[n]ot one officer in five hundred. . .ever cast a ballot."[102] This shift may be attributed to an instinctive perception among officers that partisanship is incompatible with the military's special relationship to the nation, and to the service academies, whose teachings were inculcating in cadets what one officer described as "contempt for mere politicians and their dishonest principles of action."[103] Whatever its cause, the "concept of an impartial, nonpartisan, objective career service, loyally serving whatever administration or party was in power, became the ideal for the military profession," and servicemen "compared themselves

favorably with the more backward and still largely politics-ridden civil service."[104]

Its opinion in *Greer v. Spock*[105] indicates that the Court views the tradition of a politically neutral military as a corollary to the doctrine of civilian control over the armed forces, and will sustain objective, fairly administered military policies aimed at furthering that tradition. Upholding the constitutionality of military regulations[106] which banned all partisan political activities from Fort Dix, New Jersey and prohibited the distribution of written materials on the installation without prior approval, the Court observed that the challenged regulations shielded the military from "both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates" and were "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."[107]

In his concurring opinion,[108] Justice Powell treated the public interest in preserving the *appearance* of a politically neutral military as a discrete concern separate from the interest in preserving the reality of political neutrality.[109] In later cases[110] the Court acknowledged that "avoiding the appearance of political favoritism is a valid justification for limiting speech" in forums which are not traditionally open to public expression.[111] One question which the Court deliberately left unanswered in *Greer v. Spock* is whether this justification enables the military to prohibit the distribution of conventional political campaign literature on its installations.[112]

Although there are indications that, at least at high echelons, the military's involvement in partisan affairs has declined sharply from the levels of political activity common during the first ninety years under the Constitution,[113] jurists[114] and commentators[115] continue to recognize that a politicized military is antagonistic to democratic government. The expansion of an increasingly professional and politically sophisticated peacetime military establishment, and the continuing emergence of defense-related issues as paramount political concerns, may combine to increase the risk that the military will abandon its apolitical role.[116] This potential--and the likelihood that it will be realized within the major-party

system[117]--must be weighed in devising an appropriate manner of applying constitutional principles to conventional partisan expression in the military.

Civilian Control Over the Military

The higher purpose served by the military's tradition of political neutrality is the preservation of civilian control over the armed forces.[118] As Justice Powell explained in *Greer v. Spock,* [119] "[c]ommand of the Armed Forces placed in the political head of state, elected by the people, assures civilian control of the military," but that control "could be compromised by participation of the military *qua* military in the political process."[120] The two principles are closely intertwined, but they illuminate slightly different concerns relevant to the soldier's right to political expression; an analysis of first amendment theory therefore benefits from their separate treatment.

Although the Framers of the Constitution clearly believed in the primacy of civilian control,[121] they were "more afraid of military power in the hands of political officials than of political power in the hands of military officers."[122] The Constitution's division of authority over the military between the federal and state governments, and between the executive and legislative branches, responds to this apprehension. Because they were

> [u]nable to visualize a distinct military class, [the Framers] could not fear such a class. But there was need to fear the concentration of authority over the military in any single governmental institution. As conservatives, they wanted to divide power, including power over the armed forces. The national government if it monopolized military power would be a threat to the states; the President if he had sole control over the armed forces would be a threat to the Congress. Consequently, the Framers identified civilian control with the fragmentation of authority over the military.[123]

Modern interpretations of the principle of civilian control focus on the need to subordinate the military rather than prevent usurpation of military power by the political branches.[124] As the Supreme Court described it, the

principle provides simply that the "military establishment is subject to the control of the civilian Commander in Chief and the civilian department heads under him, and its function is to carry out the policies made by those civilian superiors."[125]

Especially in highly institutionalized societies such as the United States, the principle of civilian control is as difficult to apply as it is easy to state.[126] The stability of the civilian regime in such societies, in conjunction with the dependency of the military establishment's bureaucracay, the diversification of power, and the respect for civilian leadership instilled in a highly professional officer corps, combine to render a military putsch highly unlikely.[127] In addition, a "vast, diverse, intricately interwoven body of military knowledge, expertise, procedure, and organization" is indispensable to proper political decision making within such societies.[128] As a result, the relationship between military professionals and political leaders becomes the "central problem" of civil-military relations,[129] and the most likely setting for encroachment of civilian control. In part because they possess expertise which is indispensable to political decision making, military professionals have the opportunity to inordinately influence that process and thereby undermine the primacy of civilian control.[130]

Ironically, the necessarily close relationship between military and political leaders reduces the risk that civilian control will be toppled by military force while it increases the risk that civilian control will be eroded by military meddling. To the extent that this interdependent relationship shapes the military's perception of its status and role in the civilian government, the relationship eliminates the sense of alienation which can precipitate a coup.[131] For example, historians claim that the French army's abrupt entry into politics in 1958, which culminated in de Gaulle's assumption of national leadership, and its unsuccessful perpetration, three years later, of a putsch designed to oust him, are attributable to the army's sense of alienation and abandonment and its perception that soldiers had ben reduced to "second-class status as citizens."[132] Assuming that equality of treatment under the law reduces perceptions of alienation and abandonment, the government's obviously

compelling interest in preserving its stability is served by a constitutional theory that, to the maximum extent practicable, accords soldiers the same protections enjoyed by civilians. Judicial precedent[133] and Department of Defense policy regarding political expression[134] are consistent with this theory.

Apart from the premise that, to the fullest extent practicable, constitutional rights in the military and civilian societies should be coextensive, the principle of civilian control over the armed forces supports two conclusions relevant to the soldier's right to political expression and the extent to which that right may be regulated. First, the principle of civilian control directly justifies Article 88[135] of the Uniform Code of Military Justice--which prohibits commissioned officers from directing "contemptuous words" against certain high-ranking federal and state political figures[136]--and less directly justifies Articles 89[137] and 91,[138] which prohibit disrespectful language to military superiors. Article 88 clearly furthers the principle of civilian control by protecting political leaders from belittlement by influential military personnel,[139] and Articles 89 and 91 arguably help create an environment supportive of the principle by enforcing, within the military community, a demeanor consistent with respect for authority.[140]

The second conclusion apparent from the preceding discussion of the tradition of civilian control over the military is that not all military personnel pose an equal risk to the civilian leadership, and that the government's interest in restricting soldiers' speech will depend, in part, on the speaker's rank. In less industrialized societies where the risk to civilian control takes the form of forcible military intervention, and in highly industrialized societies, where the risk arises from the necessarily close relationship between military and political leaders, it is the high ranking officer who poses the greatest danger to the primacy of civil government.[141] Because of their proximity to political decision making and their possession of expertise indispensable to that process, senior officers have the opportunity to exert undue influence in the political arena. Their positions of authority also enable them to control large numbers of subordinates and make it more likely that their own views will be misinterpreted as "official policy." These factors suggest that, at least

from the perspective of preserving traditional civilian control over the military, restrictions on military expression should vary depending upon the speaker's rank and position.[142]

IV
DEFINING THE RIGHT OF POLITICAL EXPRESSION

Current Restrictions on Political Expression in the Military

Any examination of current legal restrictions on political expression within the military must begin with an awareness that the two Department of Defense policies most relevant to the soldier's constitutional rights in this area are incompatible. On one hand, the Department of Defense expects and encourages soldiers to "carry out the obligations of a citizen,"[143] and purports to preserve their right of expression "to the maximum extent possible, consistent with good order and discipline and the national security."[144] On the other hand, the Department of Defense recognizes and appreciates its tradition of political neutrality and prohibits activities that may be interpreted as associating the government with partisan political causes or candidates.[145]

The Army's attempt to accommodate these interests by limiting soldiers' political freedoms began as early as 1914;[146] its regulatory restrictions have not changed substantially for at least the last forty years.[147] The political freedoms of today's soldiers, however, are also defined by treaty provisions,[148] federal statutes[149] and Department of Defense directives.[150]

Statutory Restrictions

The soldier's right of political expression is affected both by statutes applicable to the general public[151] and by statutes which apply only to the armed forces. Foremost among federal laws within the latter category is a statute which bars active duty officers from holding elective office.[152] Other statutes specifically applicable to members of the armed forces are designed to protect suffrage rights, either by eliminating activities which endanger free political choice within the military, or by preventing the use of military troops to interfere with voting in the civilian community. Thus, commissioned and noncommissioned officers may neither attempt to

influence soldiers to vote or refrain from voting for particular candidates, nor compel soldiers to assemble at locations where voting is taking place.[153] Further, soldiers may not be polled on how they intend to vote or actually voted.[154]

Soldiers also benefit from a comprehensive set of statutory provisions designed to eliminate from the federal workplace the coercive influences which often attend campaign solicitations. Thus, soldiers, as employees of a department of the United States, may neither make political contributions to their employer[155] nor solicit contributions from other federal employees,[156] and all solicitations of political contributions are banned in federal offices and on military reservations.[157] Finally, a federal employee's personal decision to make or withhold permissible political contributions cannot provide the basis for favorable or unfavorable personnel action.[158]

Regulatory Restrictions

As the principle regulation restricting conventional political expression within the military, Department of Defense Directive 1344.10 purports to preserve the "traditional concept that military personnel shall not engage in partisan political activity."[159] The examples of prohibited political activities enumerated in the Directive,[160] however, indicate that its purpose is broader than mere preservation of political neutrality. Indeed, the examples of prohibited activities can be grouped into three categories based on the manner in which they strive to preserve the integrity of the nation's elective process.

First, as one of the Directive's stated policy guidelines makes clear,[161] many of the examples on the list illustrate the traditional principle that military personnel must eschew partisan political activity; presumably such noninvolvement helps preserve civilian control over the military.[162] Other examples reflect an intent to preserve the fairness of elections by prohibiting soldiers from engaging in activities which imply that the government "officially approves" of particular partisan candidates or positions. A third category includes examples which are designed to protect the federal workplace, either by minimizing coercive or disruptive

influences intrinsic to political campaigns, or by preventing soldiers from engaging in activities which interfere with their official duties.

That circumscribing the military's participation in partisan politics is the Directive's primary objective becomes apparent when the minimal restrictions on nonpartisan political involvement are compared with the comprehensive ban on partisan activities. Although its limits on nonpartisan involvement amount to little more than a restatement of standards of conduct applicable to all military behavior,[163] the Directive's restrictions of partisan political activity cover the full "speech-conduct" continuum recognized in first amendment jurisprudence.

Thus, "pure speech" is prohibited in both of its forms: soldiers may not attempt to promote partisan causes by publishing articles[164] or letters to the editor,[165] addressing political gatherings,[166] or delivering speeches in connection with campaigns,[167] media programs or group discussions.[168] The Directive also reaches expressive activity in which the "speech" component is less pure. Soldiers may not participate in letter-writing campaigns supporting partisan political causes[169] or solicit others to become partisan candidates,[170] and they are prohibited from leafletting on behalf of such causes or candidates[171] and from displaying large partisan signs, banners or posters on their private vehicles.[172] Conventional campaign activities, such as performing clerical duties,[173] joining organized "get out the vote" efforts,[174] and conducting public opinion surveys,[175] are likewise prohibited if they are undertaken on behalf of partisan candidates or causes. Finally, the Directive proscribes some partisan conduct which generally is not accorded first amendment protection, such as marching or riding in political parades.[176]

The second category of prohibited political activities illustrates the Department of Defense policy that soldiers must avoid any political involvement which suggests that the government is associated with a particular candidate or cause.[177] This policy is reflected in restrictions which prevent soldiers from acting as representatives of the armed forces when they express personal opinions about political candidates and issues,[178] sign petitions supporting specific legislative actions or partisan candidates,[179] or appear at partisan political events, even if they do not

actively participate in those events.[180] The policy is also furthered by rules preventing soldiers from marching or riding in partisan political parades[181] and from wearing uniforms while attending politcal club meetings[182] or serving as election officials.[183]

The Directive's prohibition against serving in any official capacity in a partisan political club or being listed as a sponsor of such a club[184] also advances this policy of avoiding any involvement which implies government sponsorship of partisan causes or candidates. Finally, even with regard to nonpartisan political activities and the permissible activities of members on active duty for training--areas where restrictions are minimal[185]--the Directive protects this policy by prohibiting the wearing of military uniforms while campaigning,[186] and by requiring soldiers to avoid conduct that may imply government endorsement of particular positions on nonpartisan issues.[187]

The final category of prohibited activities reflects the military's interest in protecting its workplace from partisan practices which undermine efficiency by exposing soldiers to political pressures incompatible with free exercise of the voting franchise or by distracting them from their assigned duties. Included within this category are provisions which simply apply to the political context standards of conduct to which all members of the armed services must adhere.[188] For example, the Directive prohibits soldiers from serving as election officials[189] or participating in nonpartisan political activities[190] if that involvement would interfere with military duties, and it bans soldiers from using government facilities or property in connection with nonpartisan campaigns[191] or in furtherance of political activities in which soldiers on active duty for training may become involved.[192]

This category also includes provisions which reflect the Department of Defense policy that soldiers must not use their official authority in an attempt to influence or interfere with elections.[193] This policy, which comports with several statutes designed to prevent attempts to unduly influence the political choices of others,[194] is expressly implemented at three points in the Directive.[195]

Finally, the extensive set of restrictions on political contributions, which appear both in federal statutes[196] and in the Directive,[197] should be

included within this category. These provisions comport with related standards of conduct dealing with gifts and donations,[198] and are clearly designed to eliminate from the workplace the coercive atmosphere which often surrounds requests for contributions. Under the Directive, soldiers may not make political contributions to other soldiers or federal employees;[199] nor may they solicit or receive political contributions from those persons.[200] In addition, the Directive bars from military reservations and other federal offices and facilities all solicitations and fund-raising activities;[201] a separate provision specifically prohibits soldiers from actively promoting political fund raisers.[202]

Areas of Apolitical Regulatory Interest

The examples of prohibited political activities listed in Department of Defense Directive 1344.10 illustrate the diverse forms which conventional partisan political expression may assume, and the comprehensiveness of the military's effort to curtail this type of expression. Although the Directive constitutes its primary limitation of conventional political expression, the military has, in four other areas, restricted expression for reasons other than its desire to preserve political neutrality. These restrictions limit soldiers' rights to present speeches and writings to the public;[203] distribute literature on military installations;[204] demonstrate;[205] and join private associations.[206] Because conventional political expression may involve each of these activities, they will be examined seriatim.

Current Department of Defense policy provides that information concerning the government or its departments should be withheld from the public only to the extent necessary to protect national security.[207] Accordingly, the Deparment of Defense grants to soldiers writing for publication the "widest latitude to express their views, normally restricted only by security considerations."[208] However, materials which senior Department of Defense officials submit for review are evaluated from a policy as well as a security standpoint, to determine whether they are "consistent with" established government positions and programs.[209]

In *United States v. Voorhees,*[210] the Court of Military Appeals reviewed the constitutionality of the Army regulation which implements this

Directive.[211] In the Court's principal opinion, Chief Judge Quinn interpreted the challenged regulation to provide for censorship based on national security rather than "policy" grounds, and held that the regulation, as thus interpreted, reasonably limits soldiers' rights as demanded by military necessity.[212] He expressly declined to determine whether the military could constitutionally require that defense-related information be approved on "policy" or "propriety" grounds prior to its dissemination to the public.[213]

In a separate opinion,[214] Judge Lattimer, who believed it "ill-advised and unwise to apply the civilian concepts of freedom of speech and press to the military,"[215] concluded that the importance of maintaining morale and discipline justified regulating speech on the basis of the "policy and propriety interests."[216] This curtailment of free expression was, in his view, outweighed by the risk that "[a] few dissident writers, occupying positions of importance in the militttary, could undermine the leadership of the armed forces[.]"[217] Judge Brosman, in an opinion which is remarkable for its sensitivity to "civilian" constitutional principles during a period when military courts typically paid slight attention to the Supreme Court's first amendment jurisprudence,[218] argued that military censorship policies which rest on a "nebulous phrase" such as "policy and propriety" are unconstitutional.[219]

Of the several military regulations which affect the soldier's freedom of political expression, the most frequently challenged are those which limit the distribution of literature on military installations.[220] The first of these regulations actually represented the Army's effort to liberalize a practice which had engendered litigation and adverse publicity because of its uncompromising strictness in banning anti-war literature from military bases during America's escalating--and increasingly unpopular--involvement in Vietnam during the late 1960s.[221] The regulation,[222] which allowed soldiers to distribute literature on post with the installation commander's prior approval, was tested two months after its promulgation, when the private who headed Fort Bragg's chapter of GI's United Against the War in Vietnam sought and received permission to pass out copies of the Bill of Rights and the enlisted man's oath of induction on that installation.[223] The Department of Defense issued its directive[224]

addressing on-post distribution of literature later that year, and its provisions in this area remain unchanged.[225]

The Directive denies local commanders the authority to ban dissemination of publications distributed through official outlets, but it enables commanders to require that other publications be approved as a precondition to their distribution on the installation.[226] Commanders may prohibit distribution of these publications if the literature poses "a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission."[227] In a provision which implicitly recognizes the legal infirmity of viewpoint-based restrictions on speech,[228] the Directive advises that criticism of government policies or officials is not a proper basis for prohibiting distribution.[229]

Because possessing or publishing "underground newspapers" poses little danger to military interests if the literature remains undistributed, the Directive provides that commanders may not prohibit soldiers from possessing unauthorized literature.[230] It does allow impoundment of publications meeting the "clear danger" test, however, if commanders determine that distribution of the material will be attempted.[231] Finally, subject only to federal laws which make certain language punishable,[232] and standards of conduct which prevent soldiers from pursuing personal literary efforts during duty hours[233] or with government or nonappropriated fund property,[234] soldiers may publish underground newspapers.[235]

The civil rights movement of the 1960s prompted military regulations curtailing the soldier's right to join in demonstrations.[236] This movement presented the armed forces with unprecedented problems arising from the participation by many soldiers in controversial free speech activities off the installation.[237] The regulations,[238] which were designed in part to minimize the risk that a military participant's actions would be interpreted as manifestations of official policy,[239] have remained unchanged since their promulgation.[240] They prohibit soldiers from participating in demonstrations during duty hours; while in uniform; on military reservations; in foreign countries; and under circumstances where violence is likely to result or their actions are disorderly or unlawful.[241] In addition, installation commanders are directed to ban from their

installations any demonstration which could interfere with the military mission or present a "clear danger to loyalty, discipline, or morale of the troops."[242]

The Air Force regulation pertaining to demonstrations,[243] which, like its Army counterpart,[244] adopts the prohibitive language from Department of Defense Directive 1325.6,[245] was reviewed in *Culver v. Secretary of the Air Force.*[246] In a collateral attack on his court-martial conviction for violating the regulation by demonstrating in London, the appellant, a captain in the Air Force's Judge Advocate General's Corps, contended that the regulatory prohibition of participation by airmen in "demonstrations. . .in a foreign country" is vague and overbroad.[247] The court rejected this challenge, determing first that the military did not transgress its "wide latitude in defining and implementing" a considerable interest in ensuring that airmen did not engage in potentially embarrassing or disruptive activities in the host country.[248] The court then concluded that the operative word "demonstrate" is not impermissibly vague when considered in conjunction with the regulation in which it appears; the treaty which obligates military personnel to abstain from political activities within the host nation; the traditionally apolitical nature of official military duties; and the "very meaning with which the word has come to be used."[249]

The associational right to join organizations is another form of expressive conduct which the military has regulated for purposes unrelated to its interest in avoiding partisan political involvement. A recent change[250] to Department of Defense Directive 1325.6 requires soldiers to avoid "active participation" in organizations that "espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence, or otherwise engage in efforts to deprive individuals of their civil rights."[251] Although this punitive[252] restriction addresses affiliations with extremist groups and should therefore have nominal effect on conventional partisan political expression, it warrants brief discussion in the present analysis because it raises constitutional issues which may also emerge in the mainstream of political activity.

The first amendment entitles all citizens to belong to lawful

associations[253]--including nefarious organizations such as the Ku Klux Klan[254]--and this right extends to government employees.[255] Thus, the Supreme Court has "consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."[256] Instead, civil or criminal disabilities must rest upon the citizen's "knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[257]

These principles do not deprive the military of its right to restrict the propagation of organizational beliefs by soldiers on the installation or during duty hours, especially when those beliefs entail an "animus against a certain class of co-workers."[258] Thus, one lower federal court has concluded that although the military may not "punish an admittedly competent soldier merely because it disapproves of the company he keeps," his off-duty associations and political beliefs may constitute proper bases for punishment if the government can establish a sufficient nexus between the associations or beliefs and official duty performance.[259] It is questionable, under this analysis, whether conventional political affiliations could ever cause the unspecified degree of interference with duty performance which the court requires.

Political Expression and the Courts

The Public Forum Doctrine

Defining the soldier's right to political expression is complicated by the fact that the "nature and extent of first amendment rights may vary with the location at which their exercise is sought."[260] Government ownership or control over land does not trigger an unqualified constitutional right of access to all citizens seeking a forum for first amendment activity;[261] instead, the government's rights as a landowner approximate those of a private citizen in the same position: it can "preserve the property under its control for the use to which [the land] is lawfully dedicated.[262]

Because the purpose to which the government intends to apply its property may not correspond with citizens' intentions to use the property as a site for expression, courts apply a "forum analysis" in order to ascertain whether the "Government's interest in limiting the use of its property to its

intended purpose outweighs the interest of those wishing to use the property for other purposes."[263] As this statement of the applicable balance makes clear, the degree of government control over public access depends upon the nature of the property in question.[264] Indeed, the "forum analysis" may be regarded as a method of evaluating whether expressive activity is appropriate within the context of a particular location.[265]

In applying this increasingly important[266] doctrine, the Court has recognized three categories of government property: the traditional public forum, the public forum created by government designation, and the nonpublic forum.[267] The first category consists of places such as streets, sidewalks and parks, which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[268] Because of this historical association with free expression, traditional public fora occupy a "special position in terms of First Amendment protection."[269]

The second category includes public property which has been opened to expressive activity by government fiat rather than historical tradition.[270] The Court will decline to assign property to this category in the absence of evidence establishing the government's clear intention to create a public forum.[271] Public property "which is not by tradition or designation a forum for public communication" comprises the final category.[272]

Within both types of public fora, the government's right to limit expressive activity is "sharply circumscribed."[273] The government may regulate the "time, place and manner"[274] of expression at these locations, if the rules draw no distinctions between speech based on its content or subject matter,[275] are "narrowly tailored to serve a significant government interest"[276] and preserve "ample alternative channels of communication."[277] The government can enforce content-based exclusions of speech from these fora only if it can show that such a regulation is "necessary to serve a compelling state interest" and is narrowly drawn to accomplish that purpose.[278]

Heightened judicial scrutiny of content-based restrictions on speech is warranted because the "first amendment's primary and overriding

proscription against censorship" is presumptively violated whenever the government discriminates betwen expression on the basis of the speaker's identity or the ideas he conveys.[279] Indeed, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[280]

The repugnance of content-based speech restrictions to first amendment principles was demonstrated in *Schacht v. United States,*[281] where the Court reviewed the constitutionality of a federal statute[282] which allowed actors portraying servicemen to wear uniforms in theatrical productions only if the portrayal did not tend to discredit the armed forces. In reversing Schacht's conviction for performing an antiwar "street skit" in front of an armed forces induction center while wearing parts of a uniform, the Court held that the final clause of the statute under review, which "leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."[283] Because of this "equality of status in the field of ideas,"[284] differentiations between types of speech raise equal protection as well as first amendment issues.[285] Thus, once property acquires the status of a public forum, the government may not allow access to some citizens and deny access to others based on the content of the expressive activity in which they intend to engage.[286]

Despite their undeniable importance, the first amendment and equal protection principles implicated by content-based speech restrictions have not resulted in an outright prohibition of that form of regulation. In addition to the "limited inquir[ies] into the content of speech"[287] which the government must make in order to determine whether expression belongs within a category either beyond first amendment protection[288] or on its periphery,[289] the government may consider content when its "special relationship with public employees" serves as the basis for regulating their expression.[290]

Further, in cases arising within a school,[291] a prison[292] and military installations,[293] Justice Powell found support for the proposition that the "government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests" are involved.[294]

Indeed, in two cases[295] the Court has held that the government's interest in barring partisan political speech from certain nonpublic fora is sufficiently weighty to warrant content-based restrictions on that form of expression.

In *Lehman v. Shaker Heights,* [296] a plurality of the Court concluded that a city transit system which rents advertising space to commercial business concerns need not accommodate partisan political advertising as well. In *Greer v. Spock,* [297] the Court upheld military regulations which banned partisan political speech from the installation, although civilian speakers had been allowed access in other contexts. According to the Court, these cases "properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions."[298] In each case, the Court concluded that "partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger."[299]

To appreciate the limited scope of this exception to the general prohibition of content-based regulations, it is necessary to distinguish between regulations aimed at particular *subjects* --such as politics--and regulations which purport to limit particular *viewpoints,* such as Democratic politics. Although some lower federal courts recognize that the former type of regulation "does not raise the spectre of government censorship as dramatically" as the latter,[300] the Supreme Court has stated that the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[301]

This assertion is belied, however, by the fact that none of the cases[302] in which the Court permitted content-based restrictions involved viewpoint discrimination; instead, each of the restrictions was viewpoint neutral.[303] In *Greer v. Spock,* [304] for example, the Court premised its ban of political speech on the ground that the military installation was a nonpublic forum; the Court then carefully noted the absence of any claim that "the military authorities discriminated in any way among candidates for public office based upon the candidates' supposed political views."[305] Thus, although *Spock* indicates that particularly compelling government interests within a nonpublic forum may justify subject-matter restrictions on speech, it is in no way inconsistent with the higher first amendment principle that "forbids

the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[306]

The Court's recent clarification of its definition of "content-based" speech regulations illustrates the distinction between subject matter and viewpoint in first amendment jurisprudence. In *City of Renton v. Playtime Theatres,*[307] the Court upheld a zoning ordinance which prohibited "adult" movie theatres from operating near churches, parks, schools or residential areas. The Court acknowledged that the ordinance "treats theatres that specialize in adult films differently from other kinds of theatres,"[308] but concluded that the zoning restrictions were not designed to suppress the content of adult films, and instead were aimed at the theatres' "secondary effects" on the community.

The Court observed that the zoning ordinance, as thus interpreted, is "completely consistent with [its] definition of 'content neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[309] Because the ordinance did not represent an attempt by the city to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views," it did not contravene the "fundamental principle" underlying the Court's concern about content-based speech regulation.[310] Restrictions which are justified by factors independent of the content of the regulated speech may therefore be regarded as content-neutral for first amendment purposes.[311]

The basic difference between public and nonpublic fora is suggested by the applicability, within the former setting, of equal protection principles whenever the government seeks to selectively exclude speakers. Because all speakers are similarly situated in the sense that each has a constitutional right of access onto public fora, the government "must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."[312] Within the nonpublic forum, however, "not all speech is equally situated, and the [government] may draw distinctions which relate to the special purpose for which the property is used."[313] Although the government may not betray the historic association between quintessential public fora and full expressive activity, "[n]othing in the Constitution requires [it] freely to grant access to all who

wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[314]

Because the government enjoys substantially greater latitude in regulating speech within nonpublic as opposed to public fora, the analytical process which the Court applies in distinguishing between these types of public property is fundamental in delimiting the individual's right of expression. The "crucial question"[315] which the public forum analysis addresses is whether the exercise of first amendment rights is compatible with the purposes to which the public property has been devoted.[316] The Court regards public property as a nonpublic forum "[o]nly where the exercise of First Amendment rights is incompatible with the normal activity occurring on public property[.]"[317]

Neither the government's nominal designation of public property as a nonpublic forum[318] nor the possibility that the "primary business to be carried on in the area may be disturbed"[319] by the proposed expression is sufficient to end this inquiry. Instead, "[s]ome basic incompatibility must be discerned between the communication and the primary activity of an area."[320] Importantly, in the military context, judicial assessment of this incompatibility extends beyond claims that the proposed expression would disrupt base activity;[321] courts also must consider possible "symbolic" incompatibility between the expressive activity and the specialized and unique military community.[322] The government may totally ban from nonpublic fora any expression which is "unavoidably incompatible" with the property's "character [and] traditional purpose."[323]

In applying this analysis to military installations, the Court has rejected as "historicallly and constitutionally false" the contention that military reservations share in the tradition of free expression which characterizes quintessential public fora such as streets and parks.[324] Instead, the Court cites the installation commander's authority to exclude civilians from his post[325] and the belief that expressive activity is inimical to military preparedness[326] in support of its conclusion that "[m]ilitary bases generally are not public fora[.]"[327] Incompatibility between an installation's character and purpose and proposed first amendment activity is never

greater than in those instances where the proposed activity takes the form of partisan political expression. Indeed, at least one jurist interprets Spock to hold that, "for purposes of partisan speeches on a military base, the public forum doctrine would be construed very narrowly."[328]

The single case in which the Court regarded a portion of a military installation as a public forum does not detract from this conclusion. In *Flower v. United States,* [329] the Court issued a *per curiam* opinion without benefit of briefs or oral argument,[330] in which it determined that the military had "abandoned" its interests in controlling access to a public thoroughfare which traverses the installation and is heavily used, without restriction, by civilians and soldiers.[331] The Court held that under these circumstances the installation commander was powerless to prevent Flower from distributing leaflets on the avenue, and it reversed his conviction for violating a federal statute proscribing unauthorized reentry onto a military post.[332]

Several lower courts[333] interpreted *Flower* as holding that the government creates a public forum for first amendment purposes whenever it allows members of the public to "circulate freely" on its property.[334] In subsequent cases[335] the Court explained that according selective access onto public property does not, by itself, transform the property's status under public forum analysis. The Court also emphasized that *Flower* "simply fall[s] under the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity" from traditional public fora such as the open thoroughfare in which the military had abandoned all claims of special interest.[336]

Because courts generally regard military installations as nonpublic fora for first amendment purposes, the legal consequences of that designation are crucial in defining the soldier's right to political expression. The absence, within nonpublic fora, of any "generalized constitutional right"[337] to engage in expressive activity which is incompatible with the location's character and purpose means that the government may preserve that character and purpose subject only to minimal constitutional limits. Thus, a governmental "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[338]

The government's increased latitude in regulating speech within this context is manifested in a lower threshold which must be met before expression may be restricted, and in broader, more onerous types of speech restrictions which may be applied once grounds for regulation exist. For example, with regard to the former aspect, the Court has observed that "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas" and therefore the government may exclude speakers who would "disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."[339] In contrast to the showing it must make in justifying speech regulations within public fora, in sum, the government need not establish "strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum."[340]

The government's increased control over expression within nonpublic fora is also reflected in the broader range and stricter reach of the restrictions it may impose. In addition to reasonable, content-neutral "time, place and manner" regulations, which may be imposed upon speech in any setting, the government may subject speech within nonpublic fora to content-based regulations which "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[341]

Further, the government need not "precisely tailor" its rules[342] or adopt the "least restrictive alternative"[343] when regulating speech, and may prohibit entire categories or forms of communication, provided the ban is content-neutral.[344] This broad range of allowable restrictions indicates that the "right to make distinctions in access on the basis of subject matter and speaker identity"--a right extinguished by the "equality of ideas" in public fora--is "implicit in the concept of the nonpublic forum[.]"[345]

To determine the reasonableness of these restrictions, courts examine the purpose of the nonpublic forum and all the surrounding circumstances.[346] By assessing the forum's purpose, courts can gauge the incompatibility between proposed expression and the official uses to which nonpublic fora

are devoted; presumably, restrictions on speech may increase as incompatibility increases. Among the "surrounding circumstances" which affect the reasonableness of speech restrictions in this context, the most important appears to be the extent to which alternate channels of communication are available to accommodate expression restricted within the nonpublic forum.[347]

Thus, in his concurring opinion in *Spock,* Justice Powell carefully outlined available alternative modes of communication in justifying his conclusion that a military regulation which bans partisan political speeches and demonstrations from the installation does not transgress the first amendment:

> Political communications reach military personnel on bases in every form except when delivered in person by the candidate or his supporters and agents. The prohibition does not apply to television, radio, newspapers, magazines, and direct mail. Nor could there be any prohbition on handing out leaflets and holding campaign rallies outside the limits of the base. Soldiers may attend off-base rallies as long as they do so out of uniform. The candidates, therefore, have alternative means of communicating with those who live and work on the Fort; and servicemen are not isolated from the information they need to exercise their responsibilities as citizens and voters.[348]

As this passage suggests, the existence of ample alternative channels of communication may indicate that the infringement of rights is only as broad as the particular government interest requires. Although such solicitude is not constitutionally mandated in this context, the focus on alternative communicative channels in cases arising within nonpublic fora comports with traditional judicial concern that regulations in the first amendment area reach no further than necessary to accomplish substantial government objectives.[349]

Even though the government may exclude from nonpublic fora speakers whose messages are incompatible with the location's character and purpose, it "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[350] Because this proscription of viewpoint discrimination is of

central importance in first amendment doctrine, courts apply it even in the nonpublic forum, where governmental control over speech reaches its apogee. Thus, even facially neutral time, place and manner restrictions may violate the first amendment if they are applied within a nonpublic forum in a manner calculated to control the content of permittees' expression.[351] Finally, although in some circumstances the government may ban from nonpublic fora "all persons except those who have legitimate business on the premises,"[352] once it allows access to some speakers it cannot engage in "improper partiality" by excluding access to others whose message or medium is no more incompatible with the location.[353]

Partisan Activity in the Public Workplace

Introduction: Political Neutrality and the Civil Service

One recurrent theme in American political history relates to the nation's longstanding concern[354] that the federal civilian workforce will become a politicized tool which, in the hands of a President intent on furthering his party's interests, could disrupt the democratic political process.[355] As a result, the "principle of required political neutrality"[356] for public servants has become one of the most important distinctions between public and private employees.[357] Restrictions designed to ensure this neutrality are based, in part, on a belief that the efficient administration of government requires that public employees be shielded from political coercion, and appointed and promoted based on merit rather than political affiliation.[358] Courts recognize that avoiding a "partisan civil service [which] poses a threat to good administration, governmental efficiency, and the political process itself" is a compelling interest which justifies restraints on the political expression of public employees.[359]

Presidential attention to the issue of nonpartisanship within the federal bureaucracy began with Washigton's first term, and subsequent chief executives have addressed that issue at various intervals since then.[360] The first[361] formal effort to define expectations in this area occurred in 1801, when Thomas Jefferson, who was "disturbed by the political activities" of some executive branch employees,[362] issued a directive which prompted the release of a circular stating that:

> the President of the United States has seen with dissatisfaction officers of the general government taking on various occasions active parts in the elections of public functionaries, whether of the general or state governments. . .The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.[363]

Jefferson's statement was largely ignored, and he discharged several employees based on their involvement in partisan political affairs.[364]

Management of the federal bureaucracy throughout most of the nineteenth century was heavily influenced by the "spoils system," whereby positions in federal government were staffed on a patronage basis.[365] Predictably, this practice "created a climate inhospitable to attempts to limit the political activity of public employees."[366] In 1877, President Hayes imposed the first political restriction based on an emerging reform movement aimed at eliminating the active partisan support expected of public employees who were appointed to their jobs because of their party affiliation.[367]

The order preserved the public employee's right to vote and express personal views on public issues either orally or in writing, provided the expression did not interfere with official duties, but it prohibited public employees from managing political organizations, concerns, conventions, or election campaigns.[368] Six years later, "strong discontent with the corruption and inefficiency of the patronage system of public employment"[369] culminated in the Pendleton Act,[370] which constitutes the "foundation of modern civil service."[371]

The Act did not disturb the President's authority to fill policy-making positions, but it created a separate "classified" civil service which was to be staffed with employees who had demonstrated their merit by passing

open, competitive examinations, and it established a Civil Service Commission responsible for promulgating personnel rules and administering the Act.[372] Its primary restriction on political activities was a provision prohibiting federal employees in the civil service from using their official authority or influence to interfere with federal elections or coerce the political actions of others.[373]

This prohibition addressed the practice, then common in many jurisdictions, in which a "public employee used his official position to coerce others into contributing to his party or voting for certain candidates under threat of removing certain government benefits."[374] The original Civil Service Rules were promulgated later in the year during which the Act became law; Civil Service Rule 1 "repeated the language of the Act that no one in the executive service should use his official authority or influence to coerce any other person or to interfere with an election, but went no further in restricting the political activities of federal employees."[375] As its provisions indicate, the Act embodies two principle purposes of the civil service reform movement which resulted in its enactment: a desire to "prevent political corruption and to ensure the impartial administration of the laws."[376]

The Pendleton Act's restrictions of political activities addressed abuse of position and fraud--areas beyond the scope of first amendment protection.[377] Subsequent Presidential directives, however, soon demonstrated that the interest in attaining a politically neutral civil service demanded sharp circumscriptions of public employees' freedom to engage in normally protected conventional political activities. Three years after the enactment of the Pendleton Act, for example, President Cleveland issued a political neutrality order which provided that federal office holders "have no right. . .to dictate the political action of their party associates or to throttle freedom of action within party lines by methods and practices which prevent every useful and justifiable purpose of party organization."[378]

This order is important because it extends the arena of prohibited activities to include political parties, as well as campaigns and electioneering activities.[379] In 1907 President Theodore Roosevelt issued

an executve order amending Civil Service Rule 1, section one, to provide that employees in the competitive classified service,[380] "while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."[381] Because of the absence of any significant legislative support behind Roosevelt's order, civil service employees were largely unaffected by its expansive terms while it remained the sole regulation of political activities.[382]

The expansion of the federal bureaucracy during the first six years of Franklin Roosevelt's administration, coupled with the fact that many of the "New Deal" agency positions fell within the "nonclassified" service and were therefore beyond the Civil Service political neutrality rule,[383] prompted a movement to reenact the 1907 Civil Service rule in the form of a statute and expand its coverage to include both classified and nonclassified employees.[384] Congress "feared the development of a partisan political machine run with federal employees,"[385] especially because Roosevelt's own federal appointees constituted a majority of the Civil Service.[386] Its intent to "prevent partisan political activity on the part of the Civil Service from undermining the democratic process by creating a one-party system"[387] culminated in 1939 with the passage of the Hatch Act,[388] which still represents the principle statutory restriction of political expression applicable to public employees.

Political Neutrality and the Civil Service: Modern Statutory Restrictions

Although its reiteration of political restrictions contained in the Pendleton Act and in President Theodore Roosevelt's executive order effected no substantive change in the rules being applied to public servants, the Hatch Act's conjoinment of these earlier restrictions in a "single statute. . .which also provided for enforcement powers, made limitation on political activities of public employees not a matter of executive desire but one of national law which could not be destroyed by any member of the executive branch. . .unless they were willing to subject themselves to punishment."[389]

In its current form, the Hatch Act's principle limitations on political activities of federal employees include prohibitions against using "official

authority or influence for the purpose of interfering with or affecting the result of an election"[390] and taking an "active part in political management or in political campaigns.[391] In order to resolve definitional problems which would otherwise arise with respect to the second proscription,[392] the Act incorporates by reference previous Civil Service Commission determinations as to prohibited acts of political management or political campaigning.[393] Under rules promulgated by the Office of Personnel Management, federal agency heads may further restrict political activities by employees within the agency if "participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interest."[394]

The First Amendment in the Public Employment Context

Judicial interpretation of the public employee's first amendment rights proceeds from the realization that the government acts in two separate and potentially incompatible roles when it restricts employees' speech. On one hand, "public employers are *employers,* concerned with the efficient function of their operations;"[395] on the other hand, as a government entity public employers must "operat[e] under the constraints of the First Amendment."[396] Accordingly, the "problem in any case is to arrive at a balance betwen the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[397]

Although "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general,"[398] judicial "[v]igilance is necessary to ensure that public employers do not use authoiryt over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[399]

In its first application of the balancing approach to free speech issues arising in the public employment context, the Court was confronted with a case in which a teacher had been dismissed for criticizing his employer in

erroneous public statements which addressed educational matters then in the public spotlight.[400] Despite their critical tone, these statements neither "impeded the teacher's proper performance of his daily duties in the classroom" nor "interfered with the regular operation of the schools generally."[401]

Under these circumstances, the Court concluded that the "interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[402] Accordingly, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[403]

In *Connick v. Myers,*[404] an Assistant District Attorney in New Orleans claimed that she had been discharged in violation of his first amendment rights. Upset at the prospect of an inter-office transfer, Myers prepared and circulated a questionnaire "soliticiting the views of her fellow stafgf members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[405] Shortly thereafter, the District Attorney told Myers that she was being terminated "because of her refusal to accept the transfer," and that "her distribution of the questionnaire was considered an act of insubordination."[406]

The Court began its analysis by emphasizing what it regarded as a principle firmly established in its jurisprudence: when "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[407] Although the Court characterized Myers' questionnaire as "an employee grievance concerning internal office policy,"[408] it did acknowledge that her inquiry regarding political campaign pressures within the District Attorney's office touched on matters of public concern, and it therefore proceeded to apply the Pickering balancing test. The Court concluded that the "limited First Amendment interest" involved in this case did not require the District

Attorney to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[409]

In *Rankin v. McPherson,* [410] the most recent case in which the Court applied its Pickering balancing test to a first amendment claim arising within the public employment context, the issue was whether a clerical employee in a county constable's office could be discharged for exclaiming, after learning of the attempted assassination of President Reagan, "If they go for him again, I hope they get him."[411] With regard to the threshold question of whether this statement addressed a matter of public concern, the Court noted that it was made during a conversation about the President's administration and was prompted by a news bulletin on the assassination attempt--a matter of extreme public interest.

Under these circumstances, the Court concluded that the statement addressed a matter of public concern.[412] Because the state was unable to demonstrate that the employee's statement discredited the office or interfered with its efficient functioning, the Court was not persuaded that the state's interest in discharging this employee outweighed the latter's rights under the first amendment.[413]

Because public employees' critical statements may trigger disciplinary action by the government in a wide variety of situations, the Court has declined to "lay down a general standard against which all such statements may be judged."[414] Decisions in this area, however, do articulate some principles which inform the ad hoc balancing test courts apply in cases involving first amendment issues arising within the public employment context. Thus, with regard to the initial question of whether the expression under review addresses a matter of public concern, courts must consider the employee's intentions,[415] as well as the "content, form, and context of a given statement;"[416] the "inappropriate or controversial character" of a statement is irrelevant.[417]

With respect to the assessment of state interests, the balancing test focuses on the "effective functioning of the public employer's enterprise."[418] Because the "burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails,"[419] the state's interest in the

efficiency of its enterprises must be evaluated in light of the employee's responsibilities within the agency.

Indeed, "nonpolicymaking employees can be arrayed on a spectrum, from university professors at one end to policemen at the other," and while the interest in preserving academic freedom argues against strict restraints against expression by the former employees, "in polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen."[420] The fact that the *Pickering* balance requires courts to measure the state's interest by assessing the impact of speech on agency effectiveness indicates that the "disruptive potential of speech remains a vital component of First Amendment analysis in any public employment context."[421]

At least in the law enforcement setting, "where an officer's speech-related activity has the effect of materially disrupting his working environment, such activity is not immunized by constitutional guarantees of freedom of speech."[422] Although some federal circuits expressly reject attempts to analogize law enforcement agencies to military forces for purposes of assessing police officers' constitutional rights,[423] most courts recognize that the "nature of police work means that the Constitution probably allows greater restrictions on police officers' activities than on those of any other type of public employee."[424]

V. DEVELOPING A STANDARD OF REVIEW

Judicial Deference and the Military

The Supreme Court has warned that "[a]nnounced degrees of 'deference' to legislative judgments. . .may all too readily become facile abstractions used to justify a result."[425] Although the Court disapproves of reliance upon judicial deference as a shorthand method of weighing competing interests in constitutional adjudication, the principle so pervasively influences the way federal courts examine constitutional claims arising within the military that an understanding of judicial deference is indispensable to a discussion of standards of review which these courts apply.[426]

Some degree of judicial deference is involved whenever the court judges a congressional enactment;[427] that task, which Justice Holmes described as "the gravest and most delicate duty that [the] Court is called upon to

perform,"[428] must be undertaken by justices who pay "due regard to the fact that [the] Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."[429] Apart from this customary deference accorded to all legislative decisions, the Court has repeatedly expressed particular reluctance to intervene in military matters.[430] Indeed, "judicial deference to. . .congressional exercise of authority is at its apogee" when courts review challenges to legislative action undertaken in furtherance of Congress' authority under the Constitution's War Powers Clause.[431]

The Court has interpreted Congress' plenary Constitutional authority to "raise and support armies"[432] and "[t]o make Rules for the Government and Regulation of the land and naval forces"[433] as the Framer's response to well-recognized differences between military and civilian societies.[434] The Court's consistent recognition of Congress' "broad and sweeping" powers in this area[435] and its awareness that the Constitution contemplated legislative rather than judicial control over "rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline,"[436] underlies traditional judicial reluctance to intervene in military affairs.

In fact, the breadth of Congress' constitutional power over military affairs has lead the Court to conclude that judicial deference to congressional decisions in this area is constitutionally mandated.[437] Thus, in reviewing the constitutionality of a statute which required only men to register for the military draft, the Court noted that "Congress was fully aware not merely of the many facts and figures presented to it by witnesses who testified before its Committees, but of the current thinking as to the place of women in the Armed Services;" the Court concluded that, under these circumstances, it could not "ignore Congress' broad authority conferred by the Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal."[438]

Notwithstanding its constitutional underpinnings, judicial deference to congressional decisions regarding military matters does not amount to a

license to "remove constitutional limitations safeguarding essential liberties."[439] According deference to a legislative determination may not be appropriate unless the challenged enactment is "relevant to an justified by. . .military purposes,"[440] and even in cases where these preconditions are satisfied, deference is not a substitute for analysis[441] and evidence[442] aimed at the central question of whether the uniqueness of the separate society requires that constitutional principles be applied in a different manner.

The Court acknowledges that its recent decisions reflect a "healthy deference" to *executive*[443] as well as legislative judgments in the area of military affairs.[444] Indeed, lower federal courts interpret the Court's jurisprudence as holding that "decisions made by the military under a delegation from Congress are entitled to deference, because of the specialized nature of judgments concerning internal military governance."[445] This interpretation comports with the Court's observation, in its most recent case involving a first amendment issue arising within the military, that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a military interest" for the same reasons that Congress is entitled to deference in this area.[446]

The executive department's "great and wide discretion. . .both in the formation and application of regulations and in their interpretation"[447] parallels Congress' plenary authority over the military, and the "largely executive character of military 'law' makes any constitutional distinction between statutes and regulations of little aid."[448] Although the Court's extension of deference to executive decisions has prompted criticism,[449] the practice is consistent with the Court's inclination to apply reduced levels of scrutiny to regulations enforced within "complex and volatile institutions" where agency officials possess special expertise.[450]

The Court's deferential approach toward military decision making is supported by factors other than Congress' plenary authority under the War Powers Clause. In fact, the Court's disinclination to substitute its judgment for legislative or executive branch decisions in this area stems from a pragmatic concern that the risks of an erroneous judicial "solution" to a military controversy are unacceptably high. The likelihood of judicial

error in this context is heightened by the fact that "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments"[451] requiring expertise which the Court does not possess.[452]

Further, in its relationship with soldiers, the defense establishment serves as "employer, landlord, provisioner and lawgiver rolled into one;"[453] because this "all-encompassing relationship is one that is largely unfamiliar to the courts,"[454] they are "ill-equipped to determine the impact upon discipline that nay particular intrusion upon military authority might have."[455] In addition, the relative infrequency of wars and the inability to duplicate the demanmds of combat during peacetime limit the opportunity meaningfully to gauge a decision's effect on the military's readiness.[456] Finally, because of the military's crucial role, "defense decisions arise in the context of an area of national concern unparalleled in importance to the nation as a whole," and are therefore "of the sort customarily entrusted to the political branches of government."[457]

Survey of Standards of Review

In *Schenck v. United States,* [458] the Supreme Court's first[459] important case involving free speech issues, Justice Holmes articulated what became known as the "clear and present danger" standard for restricting a citizen's freedom of expression:

> [T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[460]

Although some commentators welcomed the standard as an articulation of an appropriately protective judicial attitude toward speech,[461] others

criticized the test for insufficiently protecting expression[462] or unduly constraining the government's ability to prevent the consequences of unlawful speech.[463]

A major reformulation of the "clear and present danger" test occurred in *Dennis v. United States.*[464] In that case the Court accepted Chief Judge Learned Hand's interpretation of the standard in the lower court's majority opinion: in each case courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[465] As thus rephrased, the standard "became a disguised balancing test which weighed the seriousness of the danger against competing interest in free speech."[466] The resulting deemphasis of the prior standard's key requirement that the danger be clear and imminent convinced some commentators to interpret *Dennis* as an outright abandonment of the "clear and present danger" test by a majority of the Court.[467]

In *Brandenburg v. Ohio,*[468] the Court unmistakably rejected the "clear and present danger" test.[469] In its stead, the Court adopted the view that first amendment guarantees "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[470]

By focusing on both the speaker's objective language and the likelihood of his success the standard offers "broad new protection for strong advocacy."[471] Within the civilian community, this test "appears to be the proper formula for determining when speech which advocates criminal conduct may constitutionally be punished;"[472] its fundamental differences from the "clear and present danger" test[473] provide further evidence that the Court has discarded the latter standard.[474]

Three years after the Court abandoned the "clear and present danger" standard in favor of the more protective formula in *Brandenburg,* the Court of Military Appeals specifically adopted the former test as articulated in Dennis as the proper standard to apply in military cases involving disloyal statements punishable under Article 134, UCMJ. In *United States v. Priest,*[475] the accused had been convicted under Article 134, UCMJ for printing and distributing a monthly newsletter with the intent to promote

disloyalty and disaffection among members of the armed forces.

The court acknowledged that *Brandenburg* "provides the current test for the civil community in forbidding the punishment of the mere advocacy of unconstitutional change," but concluded that the "danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained."[476] Citing *Schenck* and *Dennis,* the court stated that its task was to determine "whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[477] The Court concluded that the accused's publication and distribution of "purposefully written papers calling for violent and revolutionary action" justified the court members' finding that these actions "palpably and directly" affected military order and discipline and were therefore punishable under the general article.[478]

In a collateral attack on his court-martial, Priest argued that the court members were not instructed on, and did not consider his first amendment claims.[479] The reviewing court agreed with the Court of Military Appeals that the "clear and present danger" test was the standard applicable in a military setting, and that the trial judge had properly denied Priest's request for an instruction reflecting the *Brandenburg* standard.[480] In this context, according to the court, the first amendment requires only that speech which is the subject of punishment "ten[d] to interfere with responsiveness to command or to endanger loyalty, discipline, or morale."[481]

In order to determine whether speech "tends clearly to harm responsiveness to command or to endanger loyalty, discipline, or morale, and thus whether it is protected by the First Amendment,"[482] courts must examine the circumstances under which the speech was uttered. Importantly, the government need not demonstrate a causal relationship between the expression and specific examples of weakened loyalty, discipline or morale": whether the speech has a clear tendency to diminish these qualities is the question which the court must address.[483]

Prior to the Supreme Court's decisions in *Greer v. Spock*[484] and *Brown v. Glines,*[485] several lower federal courts had upheld the constitutionality

of military regulations which enabled a commander to restrict speech based upon his determination that it posed a "clear danger" to the loyalty, discipline, or morale of his troops.[486] Rejecting claims that the regulations amounted to impermissible prior restraints and were vague and overbroad, the courts held that such a challenge "ignores the recognized peculiarities of the military community, negates the established need of the commander to preserve his control, and disregards the ascertainable standard or guideline superimposed on the regulation in the context of the military environment."[487]

When the Supreme Court reviewed the same regulation, it likewise concluded that there is "nothing in the Constitution that disables a militrary commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."[488] Because the "clear danger" standard upheld in *Greer* and in *Brown* was a specific provision of the regulations challenged in those cases, and because the Court declined to hold that the test is generally applicable to all military restrictions on free speech, the "scope and applicability" of the standard remains unresolved.[489]

The "clear and present danger" test has been criticized as an "oversimplified judgment" which cannot supplant the "weighing of values" required in first amendment analysis,[490] and some commentators believe that its application within the military would "consign the government interest to neglect."[491] The standard appears best suited to the "type of case for which it was first developed: a crowd or similarly incendiary situation, as a boundary indicator between permissible expression and regulatable action."[492] Provided there is "time for counter-persuasion," the test in these cases is a "safeguard against premature intervention by the state on the basis of speculation in historical futures."[493] The test, however, "is not appropriate where the harm is such that a corrective could not be sought through countervailing speech: contempt of court, pornography, and political activities by civil servants are examples."[494]

Although the military's "clear danger" standard dispenses with the government's requirement to demonstrate immediacy of harm--and thereby allows more flexibility in regulating speech than *Schenck's* original

formulation would permit[495]--the standard is an unsatisfactory constitutional limit to government restrictions on conventional political expression by servicemembers.[496]

In *Parker v. Levy,* [497] the Court addressed, as a matter of first impression,[498] the issue of how first amendment protections should be applied within the military. Captain Levy, a physician who was responsible in part for conducting dermatology clinics for special forces personnel destined for Vietnam, was court-martialed when he refused to obey the hospital commander's order to perform this duty. During the same period, Levy had counselled enlisted soldiers to refuse to obey orders to deploy for Vietnam; his court-martial charges therefore included allegations that he violated Articles 133 and 134 of the Uniform Code of Military Justice by publicly making disloyal statements.

Because Levy's statements merely "amounted to a call for illegal action at an indefinite, future time," under "conventional, civilian free speech standards, [his] speech would have been protected" had it arisen in a nonmilitary context.[499] However, in an opinion which repeatedly emphasizes that the military society's uniqueness demands special constraints on soldier's constitutional rights, the Court held that the conduct of a "commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."[500]

Notwithstanding the Court's indication in *Levy* that constitutional principles are subject to different application within the military society,[501] some courts continue to impose unmodified standards of review when examining constitutional issues arising within the military. Indeed, in *Frontiero v. Richardson,* [502] the Court applied prevailing equal protection analysis when it reviewed a statute[503] that automatically entitled married male officers to draw extra pay and allowances for spousal support, but conditioned entitlements for married female officers on proof of their husbands' financial dependency. Finding that the legislation's disparate treatment of female officers was based solely on administrative convenience, the Court held that the Act was unconstitutional; it never addressed any requirement to weigh special military needs or modify its level of scrutiny.

Although the Court's treatment of the constitutional issue in *Frontiero* may be explained by the fact that the challenged legislation is only nominally related to uniquely military interests, lower federal courts occasionally employ unmodified standards of review in cases where military interests are directly implicated by the challenged statute or regulation.[504] Thus, "not all review of constitutional claims that are somehow related to the military requires application of a different and more permissive standard."[505] Indeed, a minority of the Supreme Court believe that, even within the military, first amendment challenges should be examined in accordance with the same standards applied in nonmilitary settings.[506]

In *Brown v. Glines,*[507] the Court reviewed challenges to Air Force regulations which prohibited servicemembers from circulating petitions on Air Force bases without the installation commander's prior approval. These regulations were "identical in purpose and effect" to the Army regulation which the Court had upheld against similar challenges in *Spock,* and the Court regarded the "only novel question" in *Brown v. Glines* to be "whether 10 U.S.C. 1034 bars military regulations that require prior command approval for the circulation within a military base of petitions to Members of Congress."[508] Concluding that the "unrestricted circulation of collective petitions could imperil discipline," and finding "no legislative purpose that requires the military to assume this risk,"[509] the Court held that the Air Force regulations are not facially invalid because "neither the First Amendment nor 10 U.S.C. 1034 prevents the Air Force from requiring members of the service to secure approval from the base commander before distributing petitions within a military base."[510]

In its discussion of regulatory provisions under review in *Brown,* the Court observed that "[t]hese regulations, like the Army regulations in *Spock,* protect a substantial Government interest unrelated to the suppression of free expression" and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest."[511] The Court later cited *Brown* as precedent for the standard of review to be applied in reviewing a first amendment challenge to a civilian court's protective order which granted a litigant access to information but restrained his right to disseminate it.[512] In addition, lower federal courts

have misinterpreted the dicta in *Brown* as establishing the standard of review to be applied in evaluating military dress regulations,[513] first amendment challenges to a military commander's off-limits declaration,[514] infringements on soldiers' fourth amendment rights,[515] and restrictions on the speech of government employees.[516]

Although some commentators regard *Brown* as an opinion in which the Court deliberately modified prevailing first amendment standards in order to accommodate unique military interests,[517] the opinion should not be read as defining a standard of review for application within the military. The Court never elevated its observations regarding the limited intrusiveness of the specific military regulations then under review into a generalized rule applicable to first amendment challenges of all regulations. The decision, in sum, as its subsequent application in civilian contexts suggests, imposes upon the military no constitutionalized requirement that its restrictions of first amendment activities by soldiers must further a "substantial government interest unrelated to the suppression of free expression" and "restrict speech no more than is reasonably necessary to protect the substantial government interest."[518] In light of the fact that *Brown's* dicta observations have been misapplied as a standard of review for the military, it is ironic that military courts frequently cite the decision in support of the proposition that "civilian" constitutional standards must be applied differently within military society.[519]

With regard to the task of defining the constitutional status of political expression within the military, no Supreme Court case is more instructive than *United Public Workers v. Mitchell.*[520] That case arose when several executive branch employees and their union sued to enjoin the Civil Service Commission from enforcing the Hatch Act provision which forbids federal employees from taking "any active part in political management or in political campaigns," and obtain a declaratory judgment holding the Act unconstitutional.[521] The Court acknowledged that the Act's proscription of partisan political activity interferes with "what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments" to further his own political views,[522] but it determined that legislative curtailment of these rights will not be subject to strict judicial review:

> We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions.[523]

The Court thus believed that, in the area of employee regulations, "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."[524] This "rational basis"[525] standard of review "gives freedom of expression no more protection under the First Amendment than it would have under the due process clause."[526]

The Court's decisions upholding the Hatch Act support the principle that "a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government."[527] Indeed, the balancing test employed by *Pickering* and its progeny is likewise a "process of weighing the amount of constitutional protection given to the conduct in question against the extent to which restriction of it is necessary for the government agency to function."[528] The Court's decision in *Kelley v. Johnson*[529] represents an application of this principle which is especially relevant to the present analysis, because it involves a review of a regulation which infringes the constitutional rights of law enforcement officers, whose constitutional entitlements are closely analogous to the rights of soldiers.[530]

The regulation under review in *Kelley* established hair length standards for male members of a county police force. For purposes of its analysis, the Court assumed that the challenged regulation, which allegedly was "not based upon the generally accepted standard of grooming in the community" and imposed "an undue restriction" upon police officers' activities therein,

infringed upon a fourteenth amendment "liberty" interest in matters of personal appearance.[531] Citing its Hatch Act cases, the Court observed that it had "sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment," and suggested that "there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."[532]

The Court then noted that government decisions made pursuant to the state's police power are presumptively valid and entitled to wide latitude, and, citing *United Public Workers v. Mitchell,* [533] concluded that the constitutional issue to be resolved is "whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hairstyle."[534]

Although some lower courts apply *Kelley's* standards only to cases where the challenged regulation is based on the state's police power[535] or the infringed right stems from the fourteenth amendment,[536] other courts have employed the test to review the constitutionality of government regulations in a wide variety of employment situations where liberty[537] as well as first amendment[538] rights are implicated. The decision has also been applied by courts faced with constitutional issues arising within the military. Alghough the case is most often followed in reviewing military dress regulations,[539] it has also been applied in reviewing military policies providing for discharge of homosexuals.[540]

Further, one court adopted *Kelley* in a case raising first amendment issues. In *Kalinsky v. Secretary of Defense,* [541] an Orthodox Jewish Chaplain in the Air Force Reserves claimed that his constitutional right to free exercise of religion was impermissibly restricted by Air Force regulations which prevented him from fulfilling his faith's requirement that he wear a beard. Citing *Parker v. Levy,* [542]the court declined to apply the prevailing test for assessing free exercise claims. According to the court, applying the "civilian" standard would be inconsistent with the separateness of the military community and the concomitant fact that the first amendment rights of those within the community are not coextensive with the rights of

those outside of it.[543] The court perceived no reason for withholding from military decisions regarding "organization, dress and equipment" the same presumption of validity which the Supreme Court extended to like choices in the law enforcement context, since the demands of duty and discipline are at least as compelling in the former setting.[544]

In *Rostker v. Goldberg,* [545] the Court addressed the question of whether the Military Selective Service Act[546] violates the fifth amendment by authorizing the President to require that males but not females register for the draft. Relying on Supreme Court precedent emphasizing the judicial deference to which Congress is entitled with regard to military matters, the Solicitor General urged the Court to dispense with the heightened scrutiny generally applied in cases of alleged gender-based discrimination, and examine the challenged legislation "only to determine if distinctions drawn between men and women bear a rational relation to some legitimate Government purpose."[547]

The Court rejected[548] this suggestion and expressed its adjudicative task in a manner which provides little insight into the analytical steps involved in resolving this type of constitutional issue:

> We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government. Announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred.[549]

Adopting a particularly deferential posture toward Congress in an area over

which the legislative branch exercises plenary constitutional authority, the Court simply determined that the challenged statute represented a deliberate and considered choice by Congress, and held that the Act did not violate the fifth amendment.[550]

The *Rostker* standard of review is particularly suitable for resolving issues in which specifically enumerated governmental powers and individual rights directly conflict.[551] Under those circumstances, the standard requires the reviewing court to "simply judge whether the [challenged military] restrictions. . .were authorized and justified by the power of the military to regulate itself, giving due weight to each of the conflicting interests."[552] This inquiry "does not require a 'balancing' of the individual and military interests on each side, but rather a determination whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree."[553]

Another lower federal court applied *Rostker* in determining whether the Army's military chaplaincy program violates the first amendment's establishment clause. In *Katcoff v. March,* [554] the court rejected the prevailing standard established in *Lemon v. Kurtzman*[555] because that test does not take into account the deference which must be accorded to Congressional decisions regarding military matters. On the other hand, the court was unwilling to rely upon that deference as grounds for abdicating its responsibility to exercise some form of review over military affairs.

Accordingly, the court concluded that "when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion."[556] Other federal courts have applied *Katcoff's* interpretation of the *Rostker* decision in reviewing military policies barring single parents from enlisted service[557] and prohibiting the commissioning of pregnant cadets.[558]

Particularly as interpreted in *Katcoff,* the *Rostker* test approximates the standard employed by Chief Justice Marshall in *McCullock v. Maryland.*[559] The Court applied this standard in *United States v. Robel.*[560]

In that case the Court reviewed the constitutionality of a provision of the Subversive Activities Control Act of 1950[561] which prohibited members of certain communist organizations from working in defense facilities. The Court defined its role in terms which emphasize the need to determine whether the challenged restriction is rationally related to legitimate governmental purposes, and accomplishes those objectives without transgressing specific constitutional protections:

> Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.[562]

The Court determined that in this case the "means chosen by Congress are contrary to the 'letter and spirit' of the First Amendment.[563]

In *Goldman v. Weinberger,*[564] the Court reviewed a claim that an Air Force regulation which generally proscribed the wearing of headgear indoors was unconstitutionally applied to prohibit a Jewish officer from wearing a yarmulke while in uniform, as his religion required. The Court began its analysis by emphasizing the deference which it traditionally accords the military. It drew no distinction between congressional enactments of military policy and the implementation of those policies by military authorities, and observed that "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military

authorities concerning the relative importance of a particular military interest."[565]

Noting that the Air Force had determined that standardized uniforms enhance airmen's sense of unity and encourage dedication to the unit mission, the Court rejected Goldman's claim that the first amendment's free exercise clause required the military to allow the wearing of religious apparel unless the accouterments create a "'clear danger' of undermining discipline and esprit de corps. According to the Court, it is "quite beside the point" that the petitioner's expert witnesses believed that such exceptions to the policy would be desirable, because the "desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[566] Because the uniform regulations under review "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity," they are constitutional.[567]

A proper assessment of *Goldman's* impact on the constitutional dimensions of the right to political expression in the military begins with the realization that the free exercise right implicated in that case normally receives greater constitutional protection than nonreligious expression. The government's comparatively broader latitude in regulating nonreligious as opposed to religious expression is reflected in the distinctions drawn between "pure" speech and expressive conduct, and in the lawfulness of time, place and manner restrictions even on "pure" speech. Free exercise doctrine, on the other hand, draws no such distinction between speech and conduct, and it does not provide for time, place and manner restrictions. Instead, courts examine under strict scrutiny any significant burden on the free exercise of religion.[568] Although courts arguably accord free exercise rights greater protection than other forms of expression under the first amendment, the reasoning involved in assessing the former issue applies equally to free speech analysis.[569]

Because *Goldman* involved "the most fundamental and highly protected of constitutional rights, and a factual context where professional military judgmenet was stretched to its logical extreme,"[570] the case is likely to have a widespread impact on the manner in which lower courts address constitutional issues arising within the military. Indeed, in his dissenting

opinion, Justice Brennan criticized the majority for "eschew[ing] its constitutionally mandated role" as an arbiter of constitutional claims and for "adopt[ing] for review of military decisions affecting First Amendment rights a subrational-basis standard" characterized by "absolute, uncritical" deference to military judgments.[571]

Justice Brennan's criticism of the majority opinion is based on his view that Goldman involved a substantial first amendment claim. However, the majority opinion's peremptory rejection of the claim is consistent with the manner in which courts address due process challenges to regulations. In that context the "challenging party must show that there is no rational connection between the regulation and the interest which the regulation promotes."[572] Under the traditional rational relation test, which courts use in the lowest tier of equal protection analysis[573] and in reviewing regulations which restrict unprotected forms of speech such as obscenity, child pornography, fighting words or advocacy of violence,[574] one who challenges a military regulation "would carry an extremely heavy burden of proving the classification in question patently arbitrary and unrelated to any conceivably legitimate military purpose."[575]

Such a standard would "allow military practices a presumption of validity at least as indulgent as the standard of review traditionally accorded to economic and tax legislation."[576] Traditional methods of conducting substantive due process analysis, in sum, explain the Court's deferential posture and its rejection, on relevancy grounds, of petitioner's evidence demonstrating the desirability of alternative regulatory approaches to religious garments in the military. Finally, even though it employed a relaxed standard of review normally reserved for substantive due process challenges, the Court specifically noted that the Air Force regulation under review "evenhandedly" regulated appearance in the military.[577] This observation highlights the continuing importance of viewpoint neutrality in first amendment jurisprudence and suggests that regulations which discriminate on the basis of viewpoint will be subjected to stricter scrutiny.

VI
CONCLUSION

Although political expression enjoys a preeminent position among forms of expression protected under the first amendment, unique governmental interests warrant substantial curtailment of that form of expression within the military community. Apart from the military's interest in preserving discipline, which affects the manner in which all constitutional principles are applied within the armed forces, the democratic tradition of civilian supremacy over a politically neutral military supports the imposition of substantial restrictions on soldiers' involvement in partisan political activities. Both the public forum doctrine and the Supreme Court's interpretation of first amendment issues arising in the context of public employment indicate that these restrictions will be upheld provided they are reasonably related to the need to preserve agency efficiency and are viewpoint neutral. Accordingly, courts reviewing an alleged infringement of a soldier's right to political expression should employ the "rational basis" standard of review used in substantive due process analysis.

1. Goldman v. Secretary of Defense, 739 F.2d 657, 658 (D.C. Cir. 1984) (denial of appellee's suggestion for rehearing en banc) (Starr, J., dissenting), *aff'd,* 475 U.S. 503 (1986). Professors Zillman and Imwinkelried explain that "[w]hile American involvement in Vietnam stimulated many debates, one of the most bitter questions was to what extent civilian constitutional standards should apply to the military. The educated draftee, a Vietnam phenomenon, was shocked by military practices that had never been seriously questioned." Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart,* 51 Notre Dame Law. 396, 396 (1976). Another commentator notes, "few areas seem. . . more intriguing or potentially lively. . .than this fascinating intersection between freedoms of speech and religion on the one hand and military necessity on the other." O'Neil, *The Tenth Charles L. Decker Lecture in Administrative and Civil Law: Civil Liberty and Military Necessity--Some Preliminary Thoughts on Goldman v. Weinberger,* 113 Mil. L. Rev. 31, 45 (1986).

2. D. Zillman, A. Blaustein & E. Sherman, The Military in American Society, Cases and Materials 4-2 (1978) [hereinafter cited as Zillman & Blaustein].

3. Note, *Freedom of Speech in the Military,* 8 Suffolk U.L. Rev. 761 (1974).

4. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 N.C.L. Rev. 177, 177 (1984).

5. *Id.*

6. *Id.*

7. U.S. Const. amend. I. The first amendment provides: "Congress shall make no law. . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

8. The "preferred position doctrine," which calls for higher judicial scrutiny and narrower presumptions of constitutionality when first amendment interests are implicated, can be traced to United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). For a chronological account of the evolution of the doctrine of "preferred position" in the Court's jurisprudence, see Kovacs v. Cooper, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring). One court explains that freedom of speech occupies an "exalted niche in the empyrean of personal liberties guaranteed by the Constitution" because of the "dynamics of free speech itself, inasmuch as it

benefits and protects not only the speaker but *mutatis mutandis,* the receptor of the speech as well." Alderman v. Philadelphia Housing Auth., 496 F.2d 164, 167-168 (3d Cir. 1974), *cert. denied,* 419 U.S. 844 (1974).

9. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 356 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment").

10. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace* , 19 U.C.D. L. Rev. 597, 667 (1986). The view that the constitutional value of speech should be assessed in terms of its furtherance of the goals of the democratic political system is central to the "governmental process theory" of the first amendment. In contrast to this systemic view of the first amendment is the "self development" theory, in which "the utility of speech to furthering the goals of an external system is irrelevant," and "the protection of speech depends on the possibility that the expression may contribute to individual self-realization or actualization, regardless of its external effects." *Id.* Consistent with the governmental process theory, the Court has excluded certain narrowly defined categories of speech from the first amendment's ambit because they are not an "essential part of any exposition of ideas, and are of. . .slight social value as a step to truth[.]" Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The excluded categories include obscenity, *see, e.g.,* Miller v. California, 413 U.S. 15 (1973); fighting words, *see, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1952); defamation, *see, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); libel, *see, e.g.,* New York Times v. Sullivan, 376 U.S. 255 (1964); and perjury, *see generally* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment* , 65 Va. L. Rev. 1, 8-9 (1979).

11. Although the right to vote is "integrally related to the first amendment right of free speech," Note, *Regulating Election Projections: A Conflict of Guarantees* , 63 Wash. U.L.Q. 797, 804 (1985), and has been described by the Court as a "fundamental political right. . .preservative of all rights," Reynolds v. Sims, 377 U.S. 533, 562 (1964), "most courts have not sought to merge the right to vote into the First Amendment, except in an occasional rhetorical flourish[.]" N. Dorsen, P. Bender & B. Neuborne, 1 Emerson, Haber & Dorsen's Political and Civil Rights in the United States 1054-1055 (1976)

[hereinafter cited as Haber & Dorsen]. In several voting cases, however, the Court has accorded a degree of protection to the franchise analogous to the protection granted in first amendment contexts. *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring).

12. An individual's personal right to candidacy is not itself a fundamental right. *See* Bullock v. Carter, 405 U.S. 134 (1972).

13. United Public Workers of America v. Mitchell, 330 U.S. 75, 94-95 (1947).

14. *See* Keeffe v. Library of Congress, 777 F.2d 1573, 1579 (D.C Cir. 1985).

15. *See* Hynes v. Mayor of Oradell, 425 U.S. 610, 616-17 (1976); Pennsylvania Alliance for Jobs and Energy v. Council of Borough of Munhall, 743 F.2d 182, 185 (3d Cir. 1984).

16. *See* Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, 454 U.S. 290, 298 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression").

17. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 797 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633 (1980); Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also,* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1550 (7th Cir. 1986) ("The Supreme Court has recognized substantial First Amendment protection for door-to-door solicitors"); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1251 (7th Cir. 1985) (cataloguing Supreme Court cases).

18. *See* United States v. Grace, 461 U.S. 171, 176 (1983); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Lovell v. Griffin, 303 U.S. 444 (1938); *see also* Florida Gulf Coast Bldg. and Const. Trades v. NLRB, 796 F.2d 1328, 1332 (11th Cir. 1986); Jews for Jesus. v. Bd. of Airport Comm'rs of Los Angeles, 785 F.2d 791, 793 (9th Cir. 1986); Rosen v. Port of Portland, 641 F.2d 1243, 1245 (9th Cir. 1981).

19. *See* United States v. Grace, 461 U.S. 171, 176 (1983); Carey v. Brown, 447 U.S. 455, 460 (1980); Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969). *See also* Pursley v. City of Fayetteville, Arkansas, 820 F.2d 951,

954 (8th Cir. 1987); Knolls Action Project v. Knolls Atomic Power Laboratory, 600 F. Supp. 1353, 1357 (N.D.N.Y. 1985). See Thornhill v. Alabama, 310 U.S. 88, 101 n.18 (1940), for a survey of the forms picketing may take.

20. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence"); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ([W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment"). As Justice Douglas observed, "violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" Samuels v. Mackell, 401 U.S. 66, 75 (Douglas, J., concurring). *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) ("This Court has made clear. . .that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.")

21. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ("peaceful demonstrations in public places are protected by the First Amendment").

22. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, 454 U.S. 290, 294-95 (1981). *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly"). For a discussion of the origins of political associations in the United States, see R. Wood, The Creation of the American Republic 186-96, 319-28 (1969).

23. Horn v. Kean, 796 F.2d 668, 684 (3d Cir. 1986) (Gibbons, J., dissenting). Indeed, one noted observer of America commented that "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them"; he described the right of association as "almost as inalienable in its nature as the right of personal liberty." A. deTocqueville, 2 Democracy in America 203 (Bradley, ed. 1954). Of course, the freedom is not absolute. *See* United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973).

24. Healy v. James, 408 U.S. 169, 171 (1972). *See* United States v. Robel,

389 U.S. 258, 282-283 (1967) (White, J., dissenting) ("The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and to petition for redress of grievances."). The Court first recognized the right to associate in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Since then, its decisions have established "with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." Abood v Detroit Board of Education, 431 U.S. 209, 233 (1977). *See, e.g.,* Hadnott v. Amos, 394 U.S. 358, 364 (1969); United States v. Robel, 389 U.S. 258, 263 n.7 (1967); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 543 (1963); Bates v. City of Little Rock, 361 U.S. 516, 522-523 (1960). *See also* San Francisco County Democratic Central Comm. v. Eu, 826 F.2d 814, 827 (9th Cir. 1987); Schultz v. Frisby, 807 F.2d 1339, 1343 n.16 (7th Cir. 1986); Grossart v. Dinaso, 758 F.2d 1221, 1229 n.9 (7th Cir. 1985). *See generally* Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism,* 64 Tex. L. Rev. 817, 856-857 (1986); L. Tribe, American Constitutional Law §12-23 (1978); Emerson, *Freedom of Association and Freedom of Expression,* 74 Yale L.J. 1 (1964); Fellman, *Constitutional Rights of Association,* 1961 Sup. Ct. Rev. 74; Raggi, *An Independent Right to Freedom of Association,* 12 Harv. C.R.-C.L. L. Rev. 1 (1977). This freedom embraces the right to associate with, organize and direct partisan political organizations, *see, e.g.,* Tashjian v. Republican Party of Connecticut, 107 S.Ct. 544, 548 (1986); Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opinion); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Ripon Society v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976), and the right, at least in the absence of compelling state interest, to preserve the privacy of one's political associations, *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982).

25. *See* B. Moore, Injustice: The Social Bases of Obedience and Revolt 92-100 (1978); Hirschhorn, *supra* note 4, at 225. Several courts have recognized that collective expression is more forceful and effective than individual expression. *See, e.g.,* Allen v. Monger, 583 F.2d 438, 440 (9th Cir. 1978), *vacated and remanded sub nom.* Brown v. Allen, 444 U.S. 1063 (1980);

Huff v. Secretary of the Navy, 575 F.2d 907, 913 (D.C. Cir. 1978), *rev'd,* 444 U.S. 453 (1980); State of Missouri v. National Org. for Women, 620 F.2d 1301, 1323 n.13 (8th Cir. 1980) (Gibson, J., dissenting). *See generally* Note, *Brown v. Glines: Bowing to the 'Shibboleth of Military Necessity,* 47 Brooklyn L. Rev. 249, 277 n.151 (1980). In Brown v. Glines, 444 U.S. 348, 360 (1980), the Court acknowledged the risk which collective expression poses in the military context. It observed that allowing an individual soldier to petition Congress would not unnecessarily jeopardize discipline, but that the "unrestricted circulation of collective petitions could[.]" *Id.* at 360.

26. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536, 555 (1965). In that case, the Court "emphatically reject[ed] the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Id.* at 555.

27. Picketing, for example, constitutes a clear mixture of speech and conduct and may therefore be regulated in accordance with the test set forth in United States v. O'Brien. 391 U.S. 367 (1968). *See* Johansen v. San Diego County Dist. Council, 745 F.2d 1289, 1293 (9th Cir. 1984); Miller v. United Food & Commercial Workers Union, 708 F.2d 467, 472 (9th Cir. 1983). In other contexts, the extent to which the presence of "nonspeech" elements in political expression enables incidental restriction of "speech" elements is less certain. *See, e.g.,* Paulos v. Breier, 507 F.2d 1383, 1386, n. 6 (7th Cir. 1974) ("the sending of [a] letter to subordinates urging them to support a political candidate is toward the conduct end of the speech-conduct continuum[.]") Courts will regard conduct as protectible speech if "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 411 (1974). The Court's distinction between pure speech and communicative conduct has not met with approval in the academic community. *See, e.g.,* Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression,* 54 Geo. Wash. L. Rev. 757, 799 n.269 (1986); L. Tribe, *supra* note 24, at 598-601; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv. L. Rev. 1482, 1495 (1975);

Henkin, *The Supreme Court, 1967 Term--Forward: On Drawing Lines,* 82 Harv. L. Rev. 63, 79 (1968) Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev.1, 25; Nimmer, *The Meaning of Symbolic Speech Under the First Amendment,* 21 U.C.L.A. L. Rev. 29, 33 (1973).

28. United States v. O'Brien, 391 U.S. 367, 377 (1968). With regard to laws regulating the "nonspeech" elements of expressive conduct, the Court held that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

29. Zillman, *Free Speech and Military Command,* 1977 Utah L. Rev. 423, 429. For example, commentators and courts have cited the War Powers Clause of the Constitution in support of the view that the Bill of Rights was not intended to apply to soldiers, contending that the provision reflects the framers' recognition that a separate system of laws was necessary for the military. *See* U.S. Const. art. I, § 8, cl. 14; United States v. Jacoby, 11 U.S.C.M.A. 428, 441, 29 C.M.R. 244, 257 (1960) (Latimer, J., dissenting); Rosenthal, *Conditional Federal Spending and the Constitution,* 39 Stan. L. Rev. 1103, 1145 (1987). *But see* United States v. Tempia, 16 C.M.A. 629, 633, 37 C.M.R. 249, 253 (1967) ("That military law exists and has developed separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights.") For a discussion of the view that the framers did not intend to extend first amendment rights to the military, see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I,* 72 Harv. L. Rev. 1 (1958), and Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II,* 72 Harv. L. Rev. 266 (1958). The contrary theory is explored in Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293 (1957). *See generally* Brown, *Must the Soldier Be a Silent Member of Our Society?,* 43 Mil. L. Rev. 71, 72-77 (1969); Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice,* 81 Harv. L. Rev. 1697, 1746 (1968).

30. *See, e.g.,* Reaves v. Ainsworth, 219 U.S. 296, 304 (1911) ("To those in

the military or naval forces of the United States the military law is due process.") *See also* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Carter v. Roberts, 177 U.S. 496 (1900). The Court abandoned this view in Burns v. Wilson, 346 U.S. 137 (1953). *See generally* Haber & Dorsen, *supra* note 11, at 1421.

31. *See* United States v. Vorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954). Each of the three separate opinions in this case acknowledged the first amendment's applicability to the military. The Court later reaffirmed this view. *See, e.g.,* United States v. Harvey, 19 C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 C.M.A. 529, 42 C.M.R. 131 (1970); United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967).

32. United States v. Middleton, 10 M.J. 123, 126 (CMA 1981). *See also* United States v. Stuckey, 10 M.J. 347, 349 (CMA 1981); United States v. Jacoby, 11 C.M.A. 428, 431, 29 C.M.R. 244, 247 (1960). In the criminal context, military courts require that a party urging the application of a variation of the Constitution shoulder a "heavy burden to show a need for such variance." United States v. Johnson, 21 M.J. 553, 556 (AFCMR 1985). *See also* United States v. Ezell, 6 M.J. 307, 313 (CMA 1979); Courtney v. Williams, 1 M.J. 267 (CMA 1976).

33. 417 U.S. 733 (1974).

34. *Id.* at 758.

35. *See, e.g.,* Yahr v. Resor, 431 F.2d 690, 691 (4th Cir. 1970) ("As a basic proposition, servicemen are entitled to the protections of the Bill of Rights, except where military exigencies, such as security and discipline, by necessary implication restrict their applicability.")

36. *See, e.g.,* Special Preparedness Subcomm. of the Sen. Comm. on Armed Services, Military Cold War Education and Speech Review Policies 3 (Comm. Print 1962).

37. *See, e.g.,* Joint Hearings on S.745, *et al.,* Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services, 89th Cong., 2d Ses., pt. 1, at 12 (1966) (statement of Ass't Sec'y of Defense for Manpower).

38. *See, e.g.,* Letter, Department of the Army, DCSPER-SARD, subject: Guidance on Dissent, dated 27 May 1969, cited in Zillman & Blaustein, *supra* note 2, at 4-112.

39. *See, e.g.,* Blameuser v. Andrews, 630 F.2d 538, 541 (7th Cir. 1980); Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976) ("a succession of cases in this circuit and others has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications").

40. *See, e.g.,* Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976) ("there is precious little Supreme Court law to tell us which rights clearly held by civilians apply in what circumstances to members of the military community"); Committee for GI Rights v. Callaway, 518 F.2d 466, 480 (D.C. Cir. 1975) ("Maintaining the proper balance between the legitimate needs of the military and the rights of the individual soldier presents a complex problem which lends itself to no easy solution"). Professor Emerson observed that while "[s]ome of the points where conduct in the military sphere falls outside the area of free expression are reasonably clear," such as disclosure of classified information or incitement to mutiny or insubordination, the "problem is to draw the line at that point where the requirements of the military sector end and civilian principles again come into play." Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 936 (1963).

41. *See, e.g.,* United States v. Kato, 50 C.M.R. 19, 25 (ACMR 1974).

42. *See, e.g.,* Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.")

43. *See* Zillman, *supra* note 29, at 431-33.

44. L. Boudin, *The Army and the First Amendment,* Conscience and Command 68-69 (J. Finn ed. 1971).

45. *See, e.g.,* Parker v. Levy, 417 U.S. 733 (1974); Hill v. Berkman, 635 F. Supp. 1226, 1240-41 (E.D.N.Y. 1986).

46. *See, e.g.,* Solorio v. United States, 107 S.Ct. 2924, 2941 (1987) (Marshall, J., dissenting) ("The Court's willingness to overturn precedent may reflect in part its conviction, frequently expressed this Term, that members of the armed forces may be subjected virtually without limit to the vagaries of military control.")

47. Thus in Goldman v. Weinberger, 475 U.S. 503 (1986), the Court explained

that the factors justifying limited application of constitutional protections to soldiers "do not. . .render entirely nugatory in the military context the guarantees of the First Amendment." *Id.* at 507. *See also* Anderson v. Laird, 466 F.2d 283, 295 (D.C. Cir. 1972) ("although First Amendment rights to free speech and expression may be 'less' for a soldier than a civilian, they are by no means lost to him. . .Individual freedom may not be sacrificed to military interests to the point that constitutional rights are abolished"). *See generally* Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. Rev. 181, 188 (1962) ("our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes").

48. *See generally* Hirshhorn, *supra* note 4, at 241-54. Apart from its role and relationship with other components of the government, the military is an employer, and "at least in regard to officers where the engagement is consensual and not coerced, the argument can be advanced that the Government may tacitly condition the appointment on the officer's accepting a reduced scope of constitutional protection." Kester, *supra* note 29, at 1742 n.268 (1976). However, this contention is limited by the prohibition of "unconstitutional conditions"--a legal doctrine which provides that "even where a citizen is willing to surrender a right in exchange for governmental largess, the condition imposed cannot be direct negation of an explicit constitutional right[.]" *Id. See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1445-47 (1968).

49. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

50. *See* Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L.J. 325, 366 (1971).

51. *See* Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again,* 28 Emory L.J. 3, 8 (1979).

52. *See infra* p. 10.

53. 346 U.S. 137 (1953).

54. *Id.* at 140.

55. Parker v. Levy, 417 U.S. 733, 743 (1974). *See* Culver v. Secretary of the Air Force, 559 F.2d 622, 631 (D.C. Cir. 1977) (Leventhal, J. concurring) ("The Supreme Court [in *Parker*] recognized that the special mission and structure of the armed forces may require restrictions unacceptable

elsewhere in society."). *See also* Hill v. Berkman, 635 F.Supp. 1228, 1240-41 (E.D.N.Y. 1986).

56. *See* A. Yarmolinsky, The Military Establishment 364-365 (1971). In his sociological study of the military, Yarmolinsky concludes that the American military establishment resists granting broad free speech rights to soldiers because the "value placed on free speech and the free exchange of ideas in civilian life is overshadowed by the military priorities--uniformity of conduct, maintenance of 'honor' by the officer class, loyalty to government, and adherence to a high standard of discipline." *Id.*

57. *See* T. Emerson, The System of Freedom of Expression 57 (1970). The Supreme Court has noted that "in the civilian life of a democracy many command few" while "in the military. . .this is reversed[.]" Chappell v. Wallace, 462 U.S. 296, 300 (1983). As the Court observed in Parker v. Levy, 417 U.S. 733 (1974), "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Id.* at 751.

58. *See, e.g.* , Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); United States v. Thomas, 21 M.J. 928 (ACMR 1986). *See generally* T. Emerson, *supra* note 57, at 57. Indeed, the view that soldiers should be deprived of all legal rights ignores the value of granting certain rights as a manipulative device to heighten military effectiveness. As Professor Hirschhorn explains, "From the viewpoint of the political branches the serviceman should be permitted only those rights that, because they cater to his preexisting expectations that cannot be readily effaced, induce him to be a more willing, and therefore more effective, instrument of the organization's purposes." Hirschhorn, *supra* note 4, at 234.

59. *See generally* O'Neil, *supra* note 1.

60. *See* id. at 42.

61. The Federalist, No. 23, at 200 (A. Hamilton) (B. F. Wright ed. 1961).

62. In re Grimley, 137 U.S. 147, 152-53 (1890).

63. 345 U.S. 83, 92 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters").

64. *See, e.g.,* Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("no military organization can function without strict discipline and regulation that

would be unacceptable in a civilian setting"); Brown v. Glines, 444 U.S. 348, 357 n.14 (1980) ("Loyalty, morale, and discipline are essential attributes of military service"); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) ("the military must insist upon a respect for duty and a discipline without counterpart in civilian life"); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline").

65. One commentator identifies the need for effective discipline as the "military interest most frequently invoked to justify limiting servicemen's right of political expression and association[.]" Note, *Military Discipline and Political Expression: A New Look at an Old Bugbear,* 6 Harv. C.R.-C.L. L. Rev. 525, 526 (1971).

66. *See, e.g.,* Chappell v. Wallace, 462 U.S. 296 (1983); Gay Veterans Ass'n. v. Secretary of Defense, 668 F. Supp. 11, 17 (D.D.C. 1987) ("A soldier who engages in conduct that disrupts good order and discipline. . .has failed significntly in one of his or her more important tasks as a member of the Armed Forces").

67. *See, e.g.,* H. Semmes, Portrait of Patton 8 (1955), in which the General is quoted as saying that "Discipline is the backbone of all military operations." *See also* L. Limpus, How the Army Fights: A Clear Expression of Modern High-Power Warfare 32 (1943).

68. *See, e.g.*, United States v. Adams, 19 M.J. 996, 998 (ACMR 1985) ("A compelling state interest, such as the fundamental necessity for discipline within the military, justifies governmental regulation limiting the rights to privacy"); United States v. McFarlin, 19 M.J. 790, 792 (ACMR 1985) ("Military necessity, including the fundamental necessity for discipline, can be . . .a compelling state interest").

69. Dep't of Army, Reg. No. 600-20, para. 28 (21 February 1967) [hereinafter cited as AR 600-20] provides: "(a) Military discipline is a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is founded upon respect for and loyalty to properly constituted authority. (b) While military discipline is enhanced by military training, every feature of military life has its effect on military discipline. It generally is indicated in an individual or unit by smartness of apearance

and action; by cleanliness and neatness of dress, equipment, and quarters; by respect for seniors; and by prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors."

70. *See, e.g.*, L. Limpus, *supra* note 67, at 32; Westmoreland, *Military Justice--A Commander's Viewpoint,* 10 Am. Crim. L. Rev. 1, 5 (1971).

71. *See, e.g.,* A. Etzioni, A Comparative Analysis of Complex Organizations (1961); E. Goffman, Asylums (1961); B. Moore, Injustice: The Social Bases of Obedience and Revolt (1978); L. Radine, The Taming of the Troops: Social Control in the United States Army (1977).

72. *See, e.g.*, Hirschhorn, *supra* note 4, at 219-220.

73. *See* AR 600-20, para. 28(a) ("Military discipline is a state of individual and group training"). General Westmoreland observed that "[d]iscipline is an attitude of respect for authority which is developed by leadership, precept, and training." Westmoreland, *supra* note 70, at 5. The Supreme Court alluded to the training required to develop discipline when it noted that the "inescapable demands of military discipline and obedience to orders cannot be taught on battlefields[.]" Chappell v. Wallace, 462 U.S. 296, 300 (1983). *See also* Brown v. Glines, 444 U.S. 348, 356 n.14 (1980).

74. The Army's definition of discipline states that the quality "creates a mental attitude resulting in correct conduct and *automatic obedience to military law under all conditions.*" AR 600-20, para. 28(a) (emphasis added). *See* Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection"); Department of the Air Force v. Rose, 425 U.S. 352, 368 (1976) ("Within [military] discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the *instinctive obedience of subordinates* depends upon the unquestioned specific and customary reliability of the superior") (emphasis added).

75. *See* AR 600-20, para. 28(a).

76. *See* L. Limpus, *supra* note 67, at 32.

77. Westmoreland, *supra* note 70, at 5.

78. *See* AR 600-20, para. 28(b).

79. The Supreme Court has acknowledged this concept. In Brown v. Glines, 444 U.S. 348 (1980), the Court noted that although "special dangers present

in certain military situations may warrant different restrictions on the rights of servicemen" to distribute literature on military installations, "those restrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States as on a training base or a combat-ready installation in the Pacific." *Id.* at 356 n.14 (citations omitted). *But see* Boyce, *Freedom of Speech and the Military,* 1968 Utah L. Rev. 240, 259 ("When there is no proximity to the enemy there is slight likelihood of harm, and, therefore, a more liberal attitude should be taken in allowing military personnel to voice objection to national policy").

80. *See* Goldman v. Secretary of Defense, 734 F.2d 1531, 1540 (D.C Cir. 1984), *aff'd*, 475 U.S. 503 (1986) ("the Air Force's interest in uniformity . . . lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement").

81. Indeed, General George Patton has been quoted as saying: "It is human to resent being told what to wear and how to wear it. Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly more than anything else. . .If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men." H. Semmes, Portrait of Patton 8 (1955).

82. This notion that all aspects of military society effect discipline is consistent with one commentator's conclusion that effective discipline depends, in part, on "the use of formal, coercive authority to place the soldier's environment under the control of his superiors." Hirschhorn, *supra* note 4, at 225.

83. Speech restrictions based on national security include several federal statutes prohibiting the transmission of defense information by civilians, *see, e.g.,* 18 U.S.C. §§ 793, 794, 798, 799 (1964), statutory restrictions pertaining to the communication of classified information, *see* 18 U.S.C. § 798 (1964), and Articles 101 and 104 of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982), which prohibit improper use of a countersign and aiding the enemy, respectively.

84. *See* United States v. Robel, 389 U.S. 258, 264 (1967).

85. High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. 1361, 1373 (N.D. Cal. 1987).

86. New York Times Company v. United States, 403 U.S. 713, 730 (1971) (White, J., concurring). *See* Near v. Minnesota, 283 U.S. 697 (1931); *see generally* Note, *Executive Secrecy,* 69 Cornell L. Rev. 690 (1984).
87. *See, e.g.,* Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).
88. United States v. Robel, 389 U.S. 258, 264 (1967). *Accord* Brown v. Glines, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).
89. *See, e.g.,* High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. 1361, 1373 (N.D. Cal. 1987) (unsupported assertion of nation security does not satisfy any standard of review under equal protection analysis); Kiiskila v. Nichols, 433 F.2d 745, 750 (7th Cir. 1970) (rights of civilian employed at military installation may not be threatened or curtailed based on unsupported assessment of national defense requirements).
90. 444 U.S. 507 (1980) (per curiam).
91. *Id.* at 509 n.3.
92. *See* Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government,* 71 Va. L. Rev. 801, 839 (1985).
93. *See* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972).
94. Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1027 (D.C. Cir. 1984).
95. McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983). *See* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972).
96. *Compare* United States v. Robel, 389 U.S. 258 (1967) (nominal implication of internal military affairs allowed unmodified application of constitutional principles) *with* Brown v. Glines, 444 U.S. 348 (1980) (direct implication of internal military affairs required modified application of constitutional principles).
97. U.S. Const. art. II, § 6 provides: "The President shall be Commander in Chief of the Army and Navy of the United States[.]"
98. *See, e.g.* , Greer v. Spock, 424 U.S. 828, 846 (1976) (Powell, J., concurring) ("Few concepts in our history have remained as free from challenge as [civilian control of the military]").

99. *Compare* Zillman and Imwinkelried, *The Legacy of Greer v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality,* 65 Geo. L.J. 773, 794 (1977) ("Neither constitutional nor modern history provides support for the notion that political neutrality of the military is constitutionally mandated") *and* Sherman, *supra* note 50 ("It could hardly be said that a country with seven General-Presidents, a country that has elected war heroes to the Presidency after almost every war, accurately illustrates the virtue of strict separation of military men from political affairs"), *with* Greer v. Spock, 424 U.S. 828, 841 (1976) (Burger, C.J., concurring) ("Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs"). The partisan involvement referred to in this discussion of the military's tradition of political neutrality must not be confused with the political influence the armed forces properly assert as part of their responsibility "to advise the political branches, on request, on questions of military policy." Hirschhorn, *supra* note 4, at 216 n. 240. That activity "carries no actual or implicit threat of coercive action by any group in the military if their advice is disregarded." *Id*. *See generally* S. Finer, The Man on Horseback 142-144 (1962); S. Huntington, The Soldier and the State 377-84 (1957).

100. *See* Army and Navy Chronicle, Jan. 7, 1836, at 13; Army and Navy Chronicle, Feb. 18, 1836, at 108-109; Army and Navy Chronicle, Mar. 2, 1836, at 139-140; Army and Navy Chronicle, May 19, 1836, at 315-316. The exchange of letters is described in S. Huntington, *supra* note 99, at 207 (1957).

101. S. Huntington, *supra* note 99, at 207.

102. *Id.* at 258.

103. *Id.* at 259.

104. *Id. But see* Sherman, *supra* note 50, at 344-45 (1971) ("The degree of involvement in politics by military men in this country has always been substantial").

105. 424 U.S. 828 (1976).

106. The Respondents challenged, on First and Fifth Amendment grounds, the constitutionality of Fort Dix Reg. 210-26 (1968), which provides that "[d]emonstrations, picketing, sit-ins, protest marches, political speeches

and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation;" and Fort Dix Reg. 210-27 (1970), which provides that "[t]he distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . .is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters." *Id.* at 831.

107. *Id.* at 839. The Court's "rationale. . .regarding noninvolvement of the military in partisan politics is also applicable to noninvolvement of the military in civilian ideological movements." Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1021 (8th Cir. 1982). Some commentators have criticized the majority opinion in Greer v. Spock, 424 U.S. 828 (1976), for "badly overstat[ing]" the tradition of political neutrality in the military and suggesting that the doctrine is "a principle of constitutional law." Zillman & Imwinkelried, *supra* note 79, at 791. But the Court's dicta acknowledging the "American constitutional tradition of a politically neutral military establishment under civilian control" need not be interpreted as investing the neutrality principle with constitutional stature, especially since the Court's holding with regard to the facial first amendment challenges follows from the military installation's status as a nonpublic forum upon which respondents had no generalized constitutional right to expression. In his concurring opinion, however, Chief Justice Burger did describe the military's tradition of neutrality as a "constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution." Greer v. Spock, 424 U.S. 828, 841 (1976) (Burger, C.J., concurring).

108. *Id.* at 842.

109. *See id.* at 843-44 ("I have concluded that the legitimate interests of the public in maintaining the reality and appearance of the political neutrality of the Armed Services in this case outweigh the interests of political candidates and their servicemen audience in the availability of a military base for campaign activities").

110. *See, e.g.,* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion); Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1984).

111. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1984).

112. In a footnote to its description of the regulatory provisions under challenge, the Court pointed out that Fort Dix Reg. 210-27 "does not permit the Fort Dix authorities to prohibit the distribution of conventional political campaign literature." Greer v. Spock, 424 U.S. 828, 831 n.2 (1976). Later in the opinion the Court again "emphasized that [the regulation] does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature." *Id*. at 840. The Court did not indicate whether it would uphold such a provision.

113. *See, e.g.,* Zillman, *supra* note 29, at 445 n.107.

114. *See, e.g.,* Greer v. Spock, 424 U.S. 828, 867 (1976) (Brennan, J., dissenting) ("It is the lesson of ancient and modern history that the major socially destablizing influence in many European and South American countries has been a highly politicized military"); Jones v. United States Secretary of Defense, 346 F. Supp. 97, 99 (D. Minn. 1972) ("The promotion and espousing of a politician's ends scarcely can be within the purview of permissibility as an activity for the Armed Services").

115. *See, e.g.* , Zillman & Imwinkelried, *supra* note 1, at 407.

116. *See* Vagts, *Free Speech in the Armed Forces* , 57 Colum. L. Rev. 187, 189 (1957); Garnier, *The Control of Military Organizations in a Democratic Society: Some Thoughts Concerning the Role of Social Scientists* , 49 Ind. L.J. 672, 678 (1974).

117. *See, e.g.,* Greer v. Spock, 424 U.S. 828, 841-42 (1976) (Burger, C.J., concurring) ("the real threat to the . . . neutrality of the military. . .comes. . . from the risk that a military commander might attempt to 'deliver' his men's votes for a major-party candidate"); Zillman & Imwinkelried, *supra* note 1, at 407 ("[A]n appearance by a major candidate [on a military installation] will probably involve the installation commander in the scheduling, security, traffic control, and media coverage for the event. Inevitably high military officials will be injecting themselves into political campaigns").

118. Although the Supreme Court has seldom confronted issues implicating this aspect of civil-military relations, they consistently support the primacy of civilian rule. *See, e.g.,* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (military officers are bound by President's order to duty); Dow v.

Johnson, 100 U.S. 158, 169 (1880) ("the military should be always kept in subjection to the laws of the country to which it belongs"). *See generally* Yarmolinsky, *Civilian Control: New Perspectives for New Problems,* 49 Ind. L.J. 654 (1974); Zillman, *supra* note 29, at 423.

119. 424 U.S. 828, 842 (1976) (Powell, J., concurring).

120. *Id.* at 846. *See also* Dash v. Commanding General, 307 F. Supp. 849, 856 (D.S.C. 1969), *aff'd,* 429 F.2d 427 (4th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971) ("to organize meetings on base, to seek to create of and within the military itself a cohesive force for the purpose of compelling political decisions--and political decisions directly related to the mission of the military itself--would undermine civilian government, especially civil control of the military").

121. *See, e.g.* , Garfinkel, *Introduction,* Civil-Military Relations 1 (A. Goodpaster ed. 1977) [hereinafter cited as Civil-Military Relations].

122. S Huntington, *supra* note 99, at 168 (1957).

123. *Id.*

124. As General Goodpaster points out, "The principle itself is clear: under our system, the military does what the civil authority determines, and only that; it does not do otherwise." Goodpaster, *Educational Aspects of Civil-Military Relations,* in Civil-Military Relations 32.

125. Parker v. Levy, 417 U.S. 733, 751 (1974).

126. *See generally* Goodpaster, Educational Aspects of Civil-Military Relations, in Civil-Military Relations.

127. *See generally* A. Perlmutter, The Military in Politics in Modern Times 281 (1977); Zillman, *supra* note 29, at 444; S. Huntington, *supra* note 99.

128. Goodpaster, *Educational Aspects of Civil-Military Relations,* in Civil-Military Relations 32.

129. Huntington, *The Soldier and the State in the 1970s* , in Civil-Military Relations 6.

130. Thus one commentator, after concluding that a military uprising in the United States is unlikely, argues that "[m]ilitary meddling in ordinary political decisions, a different kind of danger, can exist, and the Government well might impose some sort of muzzle on the political speech and activities of high ranking officers." Kester, *supra* note 29, at 1753 (1968).

131. *See, e.g.,* Menard, *Remarks on 'Educational Aspects of Civil-Military*

Relations,' in Civil-Military Relations 81.
132. *Id.* at 80.
133. *See, e.g.,* United States v. Jacoby, 11 C.M.A. 428, 431, 29 C.M.R. 244, 247 (1960) ("it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces").
134. Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (Sep. 12, 1969) [hereinafter cited as DOD Dir. 1325.6] provides: "The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security."
135. Uniform Code of Military Justice art. 88, 10 U.S.C. § 888 (1982) [hereinafter cited as UCMJ].
136. UCMJ art. 88 provides: "Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct."
137. UCMJ art. 89 provides: "Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."
138. UCMJ art. 91 provides in part: "Any warrant officer or enlisted member who. . .is disrespectful in language. . .toward a warrant officer, noncommissioned officer, or petty officer. . .shall be punished as a court-martial may direct."
139. *See generally* Kester, *supra* note 29.
140. As Professor Vagts notes, a "strong reason for controls on military speech is the commitment of the United States to civilian supremacy over the armed forces. The pyramid that starts with privates, seamen, and airmen bound to respect their noncommissioned officers culminates in generals and admirals bound to respect civilian secretaries and the President. These officials, who bear the ultimate responsibility, need protection for irresponsible abuse by their subordinates. Vagts, *supra* note

116, at 188.

141. Accordingly, "[t]o the extent that commentators perceive any threat to civilian control growing out of political expression, they address themselves almost exclusively to the statements of high ranking officers or officers with command responsibility." Note, *supra* note 65, at 526 n.10. *See, e.g.,* J. Ambler, Soldiers Against the State (1968); S. Huntington, *supra* note 99; C. Mills, The Power Elite (1959). For an account of the confrontation between President Truman and General Douglas MacArthur, perhaps the best known modern example of a senior officer's challenge to the principle of civilian control, see D. Rees, Korea: The Limited War 264-83 (1964).

142. This view is widely held within the academic community. *See, e.g.,* A. Yarmolinsky, *supra* note 56; Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing,* 18 Wayne L. Rev. 665 (1972); Note, *Prior Restraints in the Military,* 73 Colum. L. Rev. 1089 (1973); *Comment, Dissenting Servicemen and the First Amendment,* 58 Geo. L.J. 534 (1970); Note, *supra* note 29.

143. Dep't of Defense Directive No. 1344.10, Political Activities by Members of the Armed Forces, para. D6 (Sep. 25, 1986) [hereinafter cited as DOD Dir. 1344.10].

144. Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces, para. II (Sep. 12, 1969), as changed by Dep't of Defense Systems Transmittal No. 1325.6 (Ch. 1, 5 Jan. 1977) [hereinafter cited as DOD Dir. 1325.6]. See Dep't of Army, Pamphlet No. 190-2, Guidance on Dissent, para. 3d (March 1983) [hereinafter cited as DA Pam 190-2].

145. *See* DOD Dir. 1344.10, Encl. 2, para. 4; *see also* Dep't of Defense Directive No. 5410.18, Community Relations (Jul. 3, 1974); Dep't of Defense Instruction No. 5410.19, Armed Forces Community Relations, Encl. 4 (Jul. 19, 1979).

146. *See* 1 Jessup, Elihu Root 247 (1938). *See generally* Vagts, *supra* note 116.

147. *Compare* Dep't of Army, Reg. No. 600-10, Army Command Policy and Procedures, para. 6 (10 November 1950) *with* Dep't of Army, Reg. No. 600-20, Army Command Policy and Procedures, para. 5-20 (20 August 1986)

[hereinafter cited as AR 600-20]. Apart from a provision in the earlier regulation which prevented active duty and retired persons from attempting to influence Congressional action--a restriction which has since been dropped--the political restrictions are virtually identical. *See generally* Vagts, *supra* note 116; Brown, *supra* note 29.

148. The Status of Forces Treaty, [1951] 4 U.S.T. 1792, T.I.A.S. No. 2486, art. II, provides: "It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving States and to abstain from any activities inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving state. It is also the duty of the sending state to take necessary measures to that end. *Id.* at 1796. Because of their limited applicability to conventional partisan political expression, treaty provisions which restrict soldiers' first amendment rights will not be separately addressed in this article. For discussion of the above-cited treaty provision's effect on political expression, see Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977).

149. *See, e.g.,* 2 U.S.C. §§441(a), 441f, 441g (1976); 18 U.S.C. §§ 592-593 (1948); 18 U.S.C. § 594 (1970); 18 U.S.C. § 596 (1948); 18 U.S.C. §§ 602-603 (1980); 18 U.S.C. § 606 (1948); 18 U.S.C. § 607 (1980); 42 U.S.C. § 1973cc-25 (1955).

150. *See, e.g.,* DOD Dir. 1344.10; DOD Dir. 1325.6.

151. The federal statutes prescribing campaign contribution levels are one example. *See, e.g.,* 2 U.S.C. §§ 441(a), 441f, 441g (1976).

152. *See* 10 U.S.C. § 973(b) (1980).

153. *See* 42 U.S.C. § 1973cc-25 (1955).

154. *See* 18 U.S.C. § 596 (1948).

155. See 18 U.S.C. § 603(a). Under this statute, making political contributions is prohibited only if the person receiving the contribution from the federal employee is the "employer or employing authority" of the contributor. The Department of Defense prohibits soldiers from making campaign contributions to "another member of the Armed Forces or to a civilian officer or employee of the United States for promoting a political objective or cause." DOD Dir. 1344.10, Encl. 2, para. 3d.

156. *See* 18 U.S.C. § 602 (1980).

157. *See* 18 U.S.C. § 607 (1980).
158. *See* 18 U.S.C. § 606 (1948).
159. DOD Dir. 1344.10, encl. 2, para. 4.
160. *See id.* at encl. 2. The list of prohibited political activities also appear at AR 600-20, app. B.
161. *See id.* at para. D1b ("A member shall not. . .(3) Participate in partisan political management, campaigns, or conventions").
162. *See supra* notes 118-120 and accompanying text.
163. The Directive "does not preclude participating in local nonpartisan political campaigns," and requires only that soldiers engaging in that activity refrain from wearing the uniform or using government property or facilities; avoid nonpartisan activities which would interfere with their duty performance; and eschew conduct which would imply government involvement in the nonpartisan campaign or approval of a position. DOD Dir. 1344.10, para. 4, encl. 2. Standards of conduct similarly provide that government facilities and property will be used only for official government business, and that soldiers may not engage in outside activities which interfere with their official duties. *See, e.g.,* Dep't of Army, Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, paras. 2-4, 2-6 (28 January 1988) [hereinafter cited as AR 600-50].
164. *See* DOD Dir. 1344.10, encl. 2, para. 3f.
165. *See id.* at para. 2f.
166. *See id.* at para. 3h.
167. *See id.* at para. 3c.
168. *See id.* at para. 3i.
169. *See id.* at para. 2g.
170. *See id.* at para. 3b.
171. *See id.* at para. 3j.
172. *See id.* at para. 3o.
173. *See id.* at para. 3l.
174. *See id.* at para. 3p.
175. *See id.* at para. 3j.
176. *See id.* at para. 3n.
177. *See id.* at para. 4.
178. *See id.* at para. 2a.

179. *See id*. at para. 2e.
180. *See id*. at para. 3r.
181. *See id*. at para. 3n.
182. *See id*. at para. 2c.
183. *See id*. at para. 2d.
184. *See id*. at para. 3g.
185. *See infra* notes 190-192. The Directive "does not apply to members on active duty for training who are serving for a period of not more than 30 days," but it provides that while on active duty for training, soldiers must avoid outside activities which would interfere with or prejudice their official duties, and refrain from wearing the uniform or using government facilities when engaging in political activities. *See* DOD Dir. 1344.10, encl. 2, para. 6.
186. *See* DOD Dir. 1344.10, encl. 2, para. 5a.
187. *See id*. at para. 5c.
188. *See, e.g.,* AR 600-50.
189. *See* DOD Dir. 1344.10, encl. 2, para. 2d.
190. *See id.* at para. 5b.
191. *See id.* at para. 5a.
192. *See id*. at para. 6c.
193. *See* DOD Dir. 1344.10, para. D1(b)(1).
194. *See, e.g.,* 18 U.S.C. § 594 (1970); 42 U.S.C. § 1973cc-25 (1955).
195. *See* DOD Dir. 1344.10, paras. D1b(1); 2b; 3a.
196. *See supra* notes 155-158 and accompanying text.
197. *See* DOD Dir. 1344.10, encl. 2, paras. 3d-e.
198. *See, e.g.,* AR 600-50, para. 2-3, which provides that "DA personnel will not solicit a contribution from other DOD personnel for a gift to an official superior, make a donation or a gift to an official superior, or accept a gift or donation from DOD subordinate personnel."
199. *See* DOD Dir. 1344.10, encl. 2, para. 3d.
200. *See id.* at para. 3e.
201. *See id.* at para. 3m.
202. *See id.* at para. 3q.
203. *See* Dep't of Defense Directive No. 5230.9, Clearance of DOD Information for Public Release (Apr. 2, 1982) [hereinafter cited as DOD Dir.

5230.9].

204. *See* DOD Dir. 1325.6, para. III.A.1; Dep't of Army, Reg. No. 210-10, Installations, para. 6-4 (12 September 1977).

205. *See* DOD Dir. 1325.6, paras. III.D-E; AR 600-20, para. 5-21.

206. *See* DOD Dir. 1325.6, para. III.G.

207. *See* DOD Dir. 5230.9.

208. *Id.* at para. E.4c.

209. *Id.* at para. E.2a(2).

210. 4 C.M.A. 509, 16 C.M.R. 83 (1954).

211. *See* Dep't of Army , Reg. No. 360-5, Public Information, General Policies, para. 15 (20 October 1950), which provides in part: "Public information officers normally perform the duties of security review. This function is limited to the deletion of classified matter and review for accuracy, propriety, and conformance to policy."

212. United States v. Voorhees, 4 C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954).

213. *Id.* at 525.

214. *See id.* at 531.

215. *Id.*

216. *Id.* at 532.

217. *Id.* at 533.

218. *See* Sherman, *supra* note 50, at 331.

219. United States v. Voorhees, 4 C.M.A. 509, 547, 16 C.M.R. 83, 121 (1954) (Brosman, J., dissenting).

220. *See, e.g.,* Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (per curiam); Greer v. Spock, 424 U.S. 828 (1976); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975); Yahr v. Resor, 431 F.2d (4th Cir. 1970); Allen v. Monger, 404 F. Supp. 1081 (N.D. Calif. 1975).

221. *See* A. Yarmolinsky, *supra* note 56, at 359.

222. Dep't of Army, Reg. No. 210-10, Installations, para. 5-15 (10 March 1969).

223. *See* A. Yarmolinsky, *supra* note 56, at 359. For another account of this incident, see N.Y. Times, May 14, 1969, at 11, col. 2.

224. *See* DOD Dir. 1325.6, paras. III.D-E.

225. The only substantive difference between the current version of DOD

Dir. 1325.6 and the version published in 1969 is the recently added prohibition against actively participating in certain extremist groups. *See infra* notes 253-259 and accompanying text.

226. *See* DOD Dir. 1325.6, para. III.A.1.

227. *Id.* The Supreme Court has upheld the validity of these provisions. *See* Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (per curiam); Greer v. Spock, 424 U.S. 828 (1976).

228. *See, e.g.,* Reagan v. Time, 468 U.S. 641 (1984).

229. *See* DOD Dir. 1325.6, para. III.A.3.

230. *Id.,* at para. III.A.2.

231. *Id.*

232. *See, e.g.,* 18 U.S.C. § 2387 (1980).

233. *See* AR 500-50, para. 2-6.

234. *See id.* at para. 2-4.

235. *See* DOD Dir. 1325.6, para. III.C.

236. *See* Zillman & Blaustein, *supra* note 2, at 4-51 (1978).

237. *See id.*

238. *See, e.g.,* Dep't of Army, Reg. No. 600-20, Army Command Policy and Procedures, para. 46.1 (3 July 1962) (C8, 1 Oct. 1965); *see generally* Brown, *supra* note 29.

239. *See* Brown, *supra* note 29, at 91.

240. *See generally id.*

241. *See* DOD Dir. 1325.6, para. III.E; AR 600-20, para. 5-21. The Department of the Army also prohibits soldiers from taking part in "strikes, picketing, marches, demonstrations, or other similar forms of concerted *labor* actions." Dep't of Army, Reg. No. 600-80, Military Labor Organizations, para. 7c(1) (1 February 1982) (emphasis added).

242. *See* DOD Dir. 1325.6, para. III.D.

243. *See* Dep't of Air Force, Reg. No. 35-15, para. 3e(3)(b)(8).

244. *See* AR 600-20, para. 5-21.

245. DOD Dir. 1325.6, para. III.E provides: "Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result, or when they are in uniform in violation of DOD Directive 1334.1."

246. 559 F.2d 622 (D.C. Cir. 1977).
247. *Id.* at 623.
248. *Id.* at 628.
249. *Id.*
250. The change was effected by Dep't of Defense Systems Transmittal No. 1325.6 (Ch. 2, 8 Oct. 1986).
251. DOD Dir. 1325.6, para. III.G.
252. The Directive provides that "Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in" the groups described in para. III.G. *Id.*
253. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 356-68 (1976).
254. *See, e.g.,* Courier Journal v. Marshall, 828 F.2d 361, 366 (6th Cir. 1987) ("Members of the Ku Klux Klan do have associational rights"); Taylor v. Jones, 495 F. Supp. 1285, 1293 n.3 (E.D. Ark. 1980) ("Citizens, including members or employees of the Arkansas National Guard, have a First Amendment right to join the Ku Klux Klan, so long as their activities do not involve violence or incitement to violence").
255. *See, e.g.,* High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. 1361, 1378 (N.D. Cal. 1987); Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984).
256. Healy v. James, 408 U.S. 169, 186 (1972).
257. *Id. See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 164-166 (1971); Aptheker v. Secretary of State, 378 U.S. 500 (1964).
258. Taylor v. Jones, 495 F. Supp. 1285, 1293 n.3 (E.D. Ark. 1980).
259. Stapp v. Resor, 314 F. Supp. 475, 479 (S.D. N.Y. 1970).
260. Finzer v. Barry, 798 F.2d 1450, 1462 (D.C. Cir. 1986).
261. *See* United States Postal Service v. Council of Greenburgh Civil Associations, 453 U.S. 114, 129-130 (1981).
262. Adderley v. Florida, 385 U.S. 39, 47 (1966).
263. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800 (1984).
264. *See id.; see also* United States v. Bjerke, 796 F.2d 643, 6547 (3rd Cir. 1986) ("whether the government must permit access to public property for

expressive activities depends on the nature of that property").

265. *See, e.g.,* Schultz v. Frisby, 807 F.2d 1339, 1344 (7th Cir. 1986) ("The expressive activity for which a claim of protection is made must be appropriate to, or not incompatible with, its location"). The classic discussion of the public forum doctrine is Kalven, *supra* note 27. *See generally* G. Gunther, Cases and Materials on Constitutional Law 1195-1305 (1981); Horning, *The First Amendment Right to a Public Forum,* 1969 Duke L.J. 931; Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233; Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment,* 28 Stan. L. Rev. 117 (1975).

266. Two commentators have pointed out that the public forum doctrine, which originated in dictum by Justice Roberts in Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), "appears to be increasing in importance" and was "almost never used in Supreme Court opinions until recently." Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 Va. L. Rev. 1219, 1221 (1984).

267. *See, e.g.,* Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 802 (1985); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

268. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-516 (1939). Traditional public fora include more than the frequently cited examples of streets, sidewalks and parks; airport complexes, for example, also belong within this category. *See* Jews for Jesus v. Board of Airport Comm'rs of the City of Los Angeles, 785 F.2d 791, 795 (9th Cir. 1986).

269. United States v. Grace, 461 U.S. 171, 180 (1983).

270. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

271. *See, e.g.,* Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 569 (1988). The government is not required to maintain indefinitely the open character of land which it has designated as a public forum. *See* United States v. Walsh, 770 F.2d 1490, 1492 (9th Cir. 1985).

272. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

273. *Id.,* at 45.

274. This expression originated in Cox v. New Hampshire, 312 U.S. 569 (1941), where the Court concluded that "[i]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets." *Id.* at 576. One commentator describes *Cox's* "identification of the terms 'time,' 'place,' and 'manner' as the content-neutral measures of the validity of a permit law" as the "crucial contribution" of that decision. Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials,* 32 Buff. L. Rev. 175, 185 (1983).

275. *See* Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 536 (1980).

276. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). With regard to content-neutral time, place and manner restrictions, the Court has "not imposed the requirement that the restriction be the least restrictive means available." City of Watseka v. Illinois Public Action Council, 107 S.Ct. 919, 920 (1987) (mem.) (White, Rehnquist, O'Connor, J.J., dissenting). *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Some lower federal courts, however, havbe added this requirement. *See, e.g.,* Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1257 (7th Cir. 1985).

277. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

278. *Id. See also* Carey v. Brown, 447 U.S. 455, 461 (1980).

279. Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1293 (7th Cir. 1981).

280. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

281. 398 U.S. 58 (1970).

282. 10 U.S.C. § 772(f) (1960). This provision states: "While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force."

283. 398 U.S. 58, 63 (1970).

284. A. Meiklejohn, Political Freedom: The Constitutional Powers of the

People 27 (1948).

285. *See, e.g.,* Carey v. Brown, 447 U.S. 455, 462 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (exemption of labor picketing from ban on picketing near schools violates fourteenth amendment equal protection right); Finzer v. Barry, 798 F.2d 1450, 1468 (D.C. Cir. 1986) ("Content-based restrictions have been held to raise both first and fourteenth amendment claims because in the course of regulating speech, they differentiate between types of speech"); Bullfrog Films v. Wick, 646 F. Supp. 492, 506 n.18 (C.D. Cal. 1986) ("when an enactment involves content-based regulation, it may be analyzed under equal protection principles").

286. This principle explains one federal court's decision that, within the Pentagon concourse, which the court regarded as a designated public forum, the government "may not permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy." United States v. Crowthers, 456 F.2d 1074, 1079 (4th Cir. 1972). In that case, the government attempted to accomplish its "selective objective" by "convenient[ly] labelling. . .good [meetings as] religious services and bad ones [as] demonstrations." *Id.*

287. Bullfrog Films v. Wick, 646 F. Supp. 492, 505 (C.D. Cal. 1986).

288. *See, e.g.,* FCC v. Pacifica Found., 438 U.S. 726 (1978) ("indecent" speech is unprotected under the first amendment). Justice Rehnquist has cited Brown v. Glines, 444 U.S. 348 (1980) for the proposition that "the source of the speech may be relevant in determining whether a given message is protected under the First Amendment." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 572 (1980) (Rehnquist, J., dissenting).

289. *See, e.g.,* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (commercial speech is not entitled to full first amendment protection).

290. Farber & Nowak, *supra* note 266, at 1240 n.104.

291. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

292. *See* Procunier v. Martinez, 416 U.S. 396 (1974).
293. *See* Greer v. Spock, 424 U.S. 828 (1976).
294. Young v. American Mini Theatres, 427 U.S. 50, 82 n.6 (1976) (Powell, J., concurring). In Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), the Court implied that content-based discrimination of speech is not always unlawful; it stated that "the prohibition of expression of one particular opinion, *at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline,* is not constitutionally permissible." *Id.* at 511 (emphasis added). In a more recent opinion the Court has noted in dicta that under certain circumstances it "might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction--if narrowly drawn--would be a permissible way of furthering those objectives[.]" Carey v. Brown, 447 U.S. 455, 465 (1980).
295. *See* Greer v. Spock, 424 U.S. 828 (1976) and Lehman v. Shaker Heights, 418 U.S. 298 (1974) (opinion of Blackmun, J.).
296. 418 U.S. 298 (1974) (plurality opinion).
297. 424 U.S. 828 (1976).
298. Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530, 539 (1980).
299. *Id.*
300. *See, e.g.,* Pennsylvania Alliance for Jobs and Energy v. Council of Borough of Munhall, 743 F.2d 182, 186 (3rd Cir. 1984); Tacynec v. City of Philadelphia, 687 F.2d 793, 798 (3rd Cir. 1982).
301. Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530, 537 (1980); Finzer v. Barry, 798 F.2d 1450, 1469 (D.C. Cir. 1986) ("We do not think the law is more severe with respect to viewpoint-based restrictions than it is to content-based retrictions").
302. *See, e.g.,* Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Heights, 418 U.S. 298 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977).
303. *See* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 61 (1983) (Brennan, J., dissenting).
304. 424 U.S. 828 (1976).
305. *Id.,* at 838-39. *See* M.N.C. of Hinesville v. United States Dep't of

Defense, 791 F.2d 1466, 1472 (11th Cir. 1986) ("the restriction [in *Spock*], though based upon content--political discussion--was viewpoint neutral").
306. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). Even if there are reasonable grounds for restricting access to a nonpublic forum, a regulation that is in reality a facade for viewpoint-based discrimination is unconstitutional. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 811 (1985). Only in rare instances have courts upheld viewpoint-based discrimination. In Locks v. Laird, 300 F. Supp. 915 (N.D. Cal. 1969), for example, the court upheld the constitutionality of a general order which prohibited Air Force members from wearing their uniforms at any "public meeting, demonstration, or interview" if they had reason to know that the purpose of those events was to express opposition to the use of the armed forces. Emphasizing the military's unique interest in preserving the "symbolic significance of the uniform," the court held that the order, "even though restricting only opposition to the use of the United States Armed Forces, is not violative of the First Amendment ban on selective suppression of expression and on coerced prescription of political orthodoxy." *Id.* at 920.
307. 475 U.S. 41 (1986).
308. *Id.* at 47.
309. *Id.* at 48, *quoting* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (emphasis added).
310. Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986).
311. *See, e.g.,* Kev v. Kitsap County, 793 F.2d 1053, 1059 (9th Cir. 1986) (ordinance banning erotic dance studios deemed content-neutral because its purpose was to alleviate undesirable social problems accompanying such studios, not to curtail protected dancing); Finzer v. Barry, 798 F.2d 1450, 1469 n.15 (D.C. Cir. 1986) (District of Columbia code section which bans placards criticizing foreign governments within 500 feet of affected country's embassy may not be content-based because it is justified by need to obey international law and protect embassies).
312. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54-55 (1983).
313. *Id. See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1984).

314. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 799-800 (1984).
315. Justice Marshall has described the compatibility issue as the "crucial question" in all forum-access cases. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
316. *See generally* Buchanan, *Toward a Unified Theory of Governmental Power to Regulate Protected Speech,* 18 Conn. L. Rev. 531 (1986).
317. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 137 (1981) (Brennan, J., concurring in judgment).
318. *See, e.g.,* United States v. Gourley, 502 F.2d 785, 787 (10th Cir. 1973) ("the decision whether an area is open or closed must be made in view of the realities of the circumstances, and not on a theoretical basis nor without finding some actual, practical effect of a formalized or ritualized 'closing'").
319. Tinker v. Des Moines School Dist., 393 U.S. 503, 508-09 (1969).
320. Greer v. Spock, 424 U.S. 828, 843-44 (1976) (Powell, J., concurring).
321. *Id.*
322. *Id.*
323. Knolls Action Project v. Knolls Atomic Power Laboratory, 600 F. Supp. 1353, 1361 (N.D. N.Y. 1985). In *Knolls Action Project,* the court determined that the "[p]resence of leafletters, regardless of their specific group affiliation" is "unavoidably incompatible" on the government-owned site of a classified nuclear research laboratory. The principle of incompatibility was invoked by the court in Koehl v. Resor, 296 F. Supp. 558, 562 (E.D. Va. 1969), in upholding the Secretary of the Army's refusal to permit the American Nazi Party to participate in a burial ceremony at Culpeper National Cemetery. The record "conclusively disclose[d] that it was the intent of the American Nazi Party to dramatize their political philosophy by wearing their Nazi-style uniforms together with combat boots, and displaying their banners and flags during the burial of their former leader." *Id.* The court concluded that a "national cemetery is a public place so clearly committed to other purposes that their use for the airing of grievances is anomalous;" the Party's exclusion from the cemetery was therefore constitutional. *Id.*
324. Greer v. Spock, 424 U.S. 828, 838 (1976). Even with regard to uniquely military issues, public debates do not historically occur on military bases.

As one court explained, "Where the military stands today may be an idelogical controversy and even more so where the military will be tomorrow. But the debate on such controversies is for civilian forums not military bases. . . .It is our elected officials who develop the 'ideology' which the [military] is *required* to carry out." Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1017 (8th Cir. 1982).

325. *See* Greer v. Spock, 424 U.S. 828, 838 (1976), *citing* Cafeteria Workers v. McElroy, 367 U.S. 886, 893 (1961).

326. *See Id.; see also* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 804 (1984) ("the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees").

327. United States v. Albertini, 472 U.S. 675, 686 (1985).

328. Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1027 (8th Cir. 1982) (Heaney, J., dissenting).

329. 407 U.S. 197 (1972) (per curiam).

330. *Id.* at 199 (Rehnquist, J., dissenting).

331. *Id.* at 198.

332. *Id.* at 199. Flower was convicted of violating 18 U.S.C. § 1382, which provides: "Whoever reenters or is found [within a military post] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof--Shall be fined not more than $500 or imprisoned not more than six months, or both."

333. *See, e.g.,* Burnett v. Tolson, 474 F.2d 877, 882 (4th Cir. 1973); Jenness v. Forbes, 351 F. Supp. 88, 94 (D. R.I. 1972); Spock v. David, 469 F.2d 1047, 1054 (3d Cir. 1972), *rev'd sub nom.* Greer v. Spock, 424 U.S. 828 (1976). Cf. CCCO-W. Region v. Fellows, 359 F. Supp. 644, 649 (N.D. Cal. 1972) ("The concept underpinning *Flower*. . .was that in being 'open' the base was quasi-public, in the sense that rigid security protection was not thought necessary").

334. *See* Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973).

335. *See, e.g.,* United States v. Albertini, 472 U.S. 675 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Greer v. Spock, 424 U.S. 828 (1976).

336. Greer v. Spock, 424 U.S. 828 (1976). *See* United States v. Albertini,

472 U.S. 675, 685 (1985) (*"Flower* did not adopt any novel First Amendment principles relating to military bases, but instead concluded that the area in question was appropriately considered a public street"). One commentator argues that "[i]t would have been more useful, and certainly more accurate, if the Court [in *Spock*] had simply acknowledged the unfortunate breadth of its language in *Flower* and disavowed it." Terrell, *supra* note 51, at 22 n.81 (1979). Terrell suggests that because the Court "focused heavily on the traditional political neutrality of the military, the most accurate conclusion to be drawn may be that in these situations the military will have a presumption in its favor that it has retained control over all areas of its installation, and that this presumption can only be overcome by very clear evidence that the area of the installation in question is completely open to all traffic without restriction." *Id.*

337. Greer v. Spock, 424 U.S. 828, 838 (1976). After determining that Fort Dix, New Jersey is a nonpublic forum, the Court stated: "The respondents, therefore, had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix[.]" *Id.*

338. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 808 (1985). *Cf.* United States v. Albertini, 472 U.S. 675, 685 (1985) ("Although a commanding officer has broad discretion to exclude civilians from a military base, this power cannot be exercised in a manner that is patently arbitrary or discriminatory"); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (plurality opinion) ("Because state action exists. . .the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious").

339. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 811 (1984). *See* United States v. Walsh, 770 F.2d 1490, 1493 (9th Cir. 1985) ("In public institutions which do not perform speech-related functions, such as military bases, the government may exclude expression which interferes in any way with the functioning of the institution").

340. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 808 (1985).

341. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). See United States v. Grace, 461 U.S. 171 (1983); Hale v. Department of Energy, 806 F.2d 910 (9th Cir. 1986); United States v. Belsky, 799 F.2d

1485 (11th Cir. 1986); United States v. Bjerke, 796 F.2d 643 (3d Cir. 1986); M.N.C. of Hinesville v. United States Dep't of Defense, 791 F.2d 1466, 1474 (11th Cir. 1986).

342. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 812 (1984).

343. Pennsylvania Alliance for Jobs & Energy v. Council of Munhall, 743 F.2d 182, 186 (3d Cir. 1984).

344. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981).

345. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

346. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 809 (1984).

347. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983). *But see* Schneider v. State, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

328. Greer v. Spock, 424 U.S. 828, 847 (1976) (Powell, J., concurring).

349. *See supra* note 276 and accompanying text.

350. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985).

351. *See id.*

352. United States v. Grace, 461 U.S. 171, 178 (1983).

353. Greer v. Spock, 424 U.S. 828, 848 (1976) (Powell, J., concurring). *See* Jenness v. Forbes, 351 F. Supp. 88, 100 (D. R.I. 1972) ("Whatever the right of a base commander of a 'closed' installation to deny access to the base to all political speakers or candidates, once he has granted access to one group of political speakers or candidates, he cannot then deny access to these plaintiffs, candidates of minority political parties who seek to exercise their fundamental First Amendment rights").

354. *See* R. Dwoskin, Rights of the Public Employee 144 (1978).

355. *See* D. Rosenbloom, Federal Service and the Constitution 94 (1971); Magness, *"Un-Hatching" Federal Employee Political Endorsements,* 134 U. Penn. L. Rev. 1497, 1516-17 (1986).

356. United Public Workers of America v. Mitchell, 330 U.S. 75, 97 (1947).

357. D. Rosenbloom, *supra* note 355, at 117-18.

358. *See* Vaughn, *Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond,* 44 Geo. Wash. L. Rev. 516, 523 (1976).
359. Grossart v. Dinaso, 758 F.2d 1221, 1230 n.10 (7th Cir. 1985). *See* United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). One court has concluded that the Peace Corps' interest in maintaining its political neutrality as a governmental interest warrants the dismissal of a Peace Corps volunteer who publicly expressed political views under circumstances where he could have been perceived as an official spokesman for the organization. Wood v. Ruppe, 659 F. Supp. 403 (D.D.C. 1987).
360. *See* Martin, *The Constitutionality of the Hatch Act: Second Class Citizenship for Public Employees,* 6 Tol. L. Rev. 78, 80 (1974).
361. *See* Magness, *supra* note 355, at 1501.
362. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973).
363. 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). *See generally* Rosenbloom, *supra* note 355, at 40.
364. *See* Vaughn, *supra* note 358, at 517 (1976).
365. *Id.*
366. *Id. See generally* D. Rosenbloom, *supra* note 355.
367. *See* D. Rosenbloom, *supra* note 355, at 96.
368. *See id.* Early Supreme Court decisions supported policies which prohibited classified federal employees from engaging in partisan political activities. *See, e.g.,* Ex parte Curtis, 106 U.S. 371 (1882) (statute which prohibited federal employees from giving or receiving political contributions from other federal employees was constitutional). State supreme courts did not unanimously follow this holding. *See* Louthan v. Commonwealth, 79 Va. Repts. 197, 206 (1884) (statute prescribing political neutrality held unconstitutional because public employees cannot be removed for exercising rights guaranteed under state constitution).
369. Elrod v. Burns, 427 U.S. 347, 354 (1976) (plurality opinion).
370. The statute was enacted as "An act to regulate and improve the civil service of the United States, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §§ 1101-05, 1301-03, 2102, 3302-07, 3318-22, 3361, 7152, 7321, 7322, 7352 (1982 & Supp. III 1985); 40 U.S.C. § 42 (1982 & Supp. III 1985).

371. Elrod v. Burns, 427 U.S. 347, 354 (1976) (plurality opinion).
372. *See generally* Magness, *supra* note 355, at 1511-12.
373. *See* R. Dwoskin, *supra* note 354, at 146.
374. *Id.*
375. United States Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 558 (1973).
376. Vaughn, *supra* note 358, at 535-36. As Vaughn explains, the "change from the spoils system to the modern civil service characterized by the Pendleton Act resulted from two historical forces. First, 'genteel reformer' pressed for a change in the corrupt system which seemed to themn to threaten a democracy itself. Second, business and social concepts of 'efficiency,' coupled with the increased importance o government action, demanded competency in the civil service. These forces, popularized by many post-Civil War abuses in government and culminating in the assassination of President Garfield by a disappointed office seeker, created the climate for civil service reform." *Id.*
377. *See* R. Dwoskin, *supra* note 354, at 147.
378. 7 Messages and Papers of the Presidents of the United States, 1789-1897 494 (J. Richardson ed. 1898).
379. *See* D. Rosenbloom, *supra* note 355, at 97.
380. Roosevelt believed that a "distinction between the degree of discrimination applied to classified and nonclassified civil servants was desirable." D. Rosenbloom, *supra* note355, at 99. Accordingly, nonclassified employees were prohibited only from using their official positions for political objectives, neglecting their public duties, and "causing public scandal" by their activities. *Id.*
381. Exec. Order No. 642, 5 C.F.R. 1.1 (1939).
382. *See* R. Dwoskin, *supra* note 354, at 147.
383. *See* Vaughn, *supra* note 358, at 518.
384. *See id.*
385. *Id.*
386. *See* R. Dwoskin, *supra* note 354, at 148.
387. D. Rosenbloom, *supra* note 355, at 102. *See* Magness, *supra* note 355, at 1501 ("The Hatch Act was passed in 1939 in response to congressional fears that the federal service, which was rapidly growing due

to the New Deal expansion in the role of government, was being used to coerce support of Roosevelt administration policies"). *Cf.* R. Dwoskin, *supra* note 354, at 153 ("the general public has been hoodwinked by a creation of primarily conservative politicians who feared the effect of the infusion of primarily liberal ideas into political life from a group that could muster real evidence to support such ideas. Fear of the ideas of public employees, not their acts, prompted the Hatch Act").

388. Hatch Political Activity Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 1501-1503, 7324-7327 (1982 & Supp. III 1985). The Act was amended in 1940; the changes extended the statute's restrictions to state and local government employees who are employed by federally funded programs. *See* Act of July 19, 1940, Pub. L. No. 76-753, § 4, 54 Stat. 767 (codified as amended at 5 U.S.C. § 1502 (1982). Pursuant to modifications effected in 1974, state and local public employees who are employed by federally funded programs are prohibited only from running for political office. See 5 U.S.C. §§ 1502, 1503 (1982). Following the 1974 amendments to the Hatch Act, the Civil Service Commission (now the Office of Personnel Management) promulgated regulations interpreting the Act. *See* 5 C.F.R. §§ 151.111-.122 (1987). For discussions of the Hatch Act and its purposes, see N. Cayer, Public Personnel in the United States (1975); Esman, *The Hatch Act--A Reappraisal,* 60 Yale L.J. 986 (1951); Rose, *A Critical Look at the Hatch Act,* 75 Harv. L. Rev. 510 (1962); Vaughn, *supra* note 358.

389. R. Dwoskin, *supra* note 354, at 148.

390. 5 U.S.C. 7324(a)(1) (1982).

391. 5 U.S.C. 7324(a)(2) (1982).

392. *See, e.g.,* Magness, *supra* note 355, at 1502 ("The statutory term 'active part in political management or in political campaigns', which was inherited from Civil Service Rule 1, did not carry a generally understood objective meaning").

393. 5 U.S.C. 7324(a)(2) provides: "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the

rules prescribed by the President." Thus, in order to understand the substance of the Hatch Act's prohibitions, "one must become familiar with the Civil Service Commission's policy of interpreting and enforcing political activity rules under the executive orders and Commission rules issued between 1883, the date of the Civil Service Act, and July 19, 1940, the date of the Hatch Act amendments." Magness, *supra* note 355, at 1503-04. During the 1940 legislative debates on the amendments to the Act, several senators expressed concern that "none of the legislators knew the content of the rulings they were incorporating into the Act." *Id.*

394. 5 C.F.R. § 733.111(b) (1987).

395. Rankin v. McPherson, 107 S.Ct. 2891, 2896 (1987).

396. *Id. See generally* Lieberwitz, *supra* note 10.

397. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

398. *Id.*

399. Rankin v. McPherson, 107 S.Ct. 2891, 2896 (1987).

400. Pickering v. Board of Educ., 391 U.S. 563 (1968).

401. *Id.* at 573.

402. *Id.*

403. *Id.* at 574. In Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), the court applied the *Pickering* balancing test in upholding the dismissal of a civilian employee of the Air Force who had worked as a language instructor. The Air Force discharged the teacher after he criticized the military service while teaching English to a class of foreign officers. Noting that "[t]here is nothing to suggest that appellant was required to keep his opinions to himself at all times or under all circumstances, but only in the immediate context of his highly specialized teaching assignment," the court concluded that the first amendment did not prevent the Air Force from imposing the "very limited restriction emerging from this record." *Id.* at 1177.

404. 461 U.S. 138 (1983).

405. *Id.* at 141.

406. *Id.*

407. *Id.* at 146.

408. *Id.* at 154.

409. *Id.*

410. 107 S.Ct. 2891 (1987).

411. *Id.* at 2894.
412. *Id.* at 2898.
413. *Id.* at 2900.
414. Pickering v. Board of Educ., 391 U.S. 563, 569 (1968).
415. *See, e.g.,* Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985); Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980).
416. Connick v. Myers, 461 U.S. 138, 148 (1983). *See* Rankin v. McPherson, 107 S.Ct. 2891, 2898 (1987) ("In performing the [Pickering] balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose").
417. Rankin v. McPherson, 107 S.Ct. 2891, 2898 (1987). The court in Johnson v. Orr, 617 F. Supp. 170 (D.C. Cal. 1985) relied upon the distinction between speech involving private as opposed to public matters when it held that plaintiff's discharge from military service for homosexuality was properly based upon a private letter from the plaintiff to her commander in which the former admitted her homosexuality. As the court explained, the "letter addresses facts private in nature and does not purport to advocate anything of a public nature. As such, it does no more than establish clearly and uncategorically that plaintiff is a homosexual. Accordingly, this letter fails to overcome the rule" in *Connick. Id.* at 178.
418. Rankin v. McPherson, 107 S.Ct. 2891, 2899 (1987).
419. *Id.* at 2900.
420. Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987).
421. Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1013 n.6 (Brennan, J., dissenting). The First Circuit Court of Appeals has identified several factors which determine the degree of first amendment protection an employee's political activity is accorded, including the exact nature of the expression; the nature of the employee's job; and the "extent to which personal loyalty is necessary to a successful employment relationship." Rodriguez Rodriguez v. Munoz Munoz, 808 F.2d 138, 147 (1st Cir. 1986). Each of these factors relates to the question of whether the employee's expression is incompatible with his official duties.
422. Hughes v. Whitmer, 714 F.2d 1407, 1422 (8th Cir. 1983).

423. *See, e.g.,* Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983).
424. Kukla v. Village of Antioch, 647 F. Supp. 799, 809 (N.D. Ill. 1986).
425. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
426. The Court recently observed that "Since *O'Callahan,* we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated." Solorio v. United States, 107 S.Ct. 2924, 2931 (1987). *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503 (1986) (free exercise of religion); Chappell v. Wallace, 462 U.S. 296 (1983) (racial discrimination); Rostker v. Goldberg, 453 U.S. 57 (1981) (sex discrimination); Brown v. Glines, 444 U.S. 348 (1980) (free expression); Middendorf v. Henry, 425 U.S. 25 (1976) (right to counsel in summary court-martial proceedings); Schlesinger v. Councilman, 420 U.S. 738 (1975) (availability of injunctive relief from impending court-martial); Parker v. Levy, 417 U.S. 733 (1974) (due process rights and freedom of expression).
427. *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
428. Blodgett v. Holden, 275 U.S. 142, 148 (1927).
429. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).
430. *See, e.g.,* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters").
431. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
432. U.S. Const. art. I, § 8, cl. 12.
433. *Id.* at cl. 14.
434. *See* Chappell v. Wallace, 462 U.S. 296, 301 (1983).
435. United States v. O'Brien, 391 U.S. 367, 377 (1968). *See* Rostker v. Goldberg, 453 U.S. 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); Gilligan v. Morgan, 413 U.S. 1 (1973); Burns v. Wilson, 346 U.S. 137 (1953); Lichter v. United States, 334 U.S. 742 (1948). *See generally* Note, Judicial Review of Constitutional Claims Against the Military, 84 Colum. L. Rev. 387 (1984).
436. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

437. *See* Rostker v. Goldberg, 453 U.S. 57, 67-68 (1981).
438. *Id.* at 71-72.
439. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).
440. Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) ("the fact that an equal protection claim arises from statutes concerning military personnel policy does not itself mandate deference to the congressional determination, at least if the sex-based classification is not itself relevant to and justified by the military purposes")
441. *See, e.g.* United States v. Grunden, 2 M.J. 116, 121 n.9 (CMA 1977) ("analysis and rationale will be determinative of the propriety of given situations, and. . .the mere uniqueness of the military society or military necessity cannot be urged as the basis for sustaining that which reason and analysis indicate in untenable").
442. *See, e.g.,* benShalom v. Secretary of the Navy, 489 F. Supp. 964, 971 (E.D. Wis. 1980) ("This court. . .will not defer to the Army's attempt to control a soldier's sexual preferences, absent a showing of actual deviant conduct and absent proof of a nexus between the sexual preference and the soldier's military capabilities").
443. The President is accorded broad authority to make rules and regulations governing the military. *See* 10 U.S.C. § 121 (1982). The Secretaries of the military departments also possess statutory authority to make regulations implementing laws prescribed by Congress. *See* 10 U.S.C. §§ 3012(g), 6011, 8012(f) (1982).
444. Rostker v. Goldberg, 453 U.S. 57, 66 (1981) ("The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court").
445. Goldman v. Secretary of Defense, 734 F.2d 1531, 1538 (D.C. Cir. 1984), *aff'd,* 475 U.S. 503 (1986). *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Mack v. Rumsfeld, 609 F. Supp. 1561 (D.C.N.Y. 1985); Cobb v. United States Merchant Marine Academy, 592 F. Supp. 640 (E.D.N.Y. 1984).
446. Goldman v. Weinberger, 475 U.S. 503, 507-508 (1986).
447. Noyd v. McNamara, 378 F.2d 538, 540 (10th Cir. 1967). *See* Brown v. Glines, 444 U.S. 348, 357 (1980) ("Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized

that the military must possess substantial discretion over its internal discipline"); Cortright v. Resor, 447 F.2d 245, 255 (2d Cir. 1971) ("the Army has a large scope in striking a proper balance between servicemen's assertions of the right of protest and the maintenance of the effectiveness of military units to perform their assigned tasks").

448. Carlson v. Schlesinger, 511 F.2d 1327, 1342 (D.C. Cir. 1975) (Bazelon, C.J., dissenting).

449. *See, e.g.,* Hirschhorn, *supra* note 4, at 242. Professor Hirschhorn argues that "[n]either the legal responsibilities nor the institutional behavior of the armed forces gives confidence that they can properly balance individual and institutional interests." *Id.*

450. Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials,* 32 Buff. L. Rev. 175, 200 n.105 (1983). Justice Warren observed that "there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity." Warren, *supra* note 47, at192.

451. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

452. *See generally* Kester, *supra* note 29. Kester explains that the "Court necessarily shies away from inquiring too deeply into the reasonableness of a legislative determination in an area requiring as much expertise and as encrusted with peculiar mores as the military." *Id.* at 1754-55.

453. Parker v. Levy, 417 U.S. 733, 751 (1974).

454. Owens v. Brown, 455 F. Supp. 291, 300 (D.D.C. 1978).

455. Warren, *supra* note 47, at 187.

456. *See* Hirschhorn, *supra* note 4, at 240.

457. Owens v. Brown, 455 F. Supp. 291, 300 (D.C.C. 1978). *See* Pauling v. McNamara, 331 F.2d 796, 799, *cert. denied,* 377 U.S. 933 (1964) ("In framing policies relating to the great issues of national defense, the people are and must be, in a sense, at the mercy of their elected representatives").

458. 249 U.S. 47 (1919).

459. *See* Dennis v. United States, 341 U.S. 494, 503 (1951) ("No important case involving free speech was decided by this Court prior to *Schenck*").

460. Schenck v. United States, 249 U.S. 47, 52 (1919).

461. *See, e.g.,* McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182

(1959).

462. *See, e.g.,* A. Meiklejohn, Political Freedom 37-38 (1960).

463. *See, e.g.,* Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger,* 70 Calif. L. Rev. 1159 (1982). The Court discussed this limitation of the clear and present danger test in Cox v. Louisiana, 379 U.S. 559 (1965), where it rejected that standard in reviewing a criminal penalty for a peaceful demonstration in front of a courthouse. The Court explained that "[e]ven assuming the applicabaility of a general clear and present danger test, it is one thing to conclude that the mere publication of a newspaper editorial or a telegram to a Secretary of Labor, however critical of a court, presents no clear and present danger to the administration of justice and quite another thing to conclude that crowds, such as this, demonstrating before a court-house may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process." *Id.* at 566.

464. 341 U.S. 494 (1951).

465. *Id.* at 510.

466. J. Nowak, R. Rotunda & J. Young, Constitutional Law 859 (1986) [hereinafter cited as Nowak & Rotunda].

467. *See, e.g.,* Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 912 (1963).

468. 395 U.S. 444 (1969) (per curiam).

469. Justices Black and Douglas both explicitly rejected the clear and present danger test in their concurring opinions. *See* Brandenburg v. Ohio, 395 U.S. 444, 453-54 (1969) (Douglas, J., concurring); *id.* at 449-50 (Black, J., concurring). *See also* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting) ("This Court long ago departed from 'clear and present danger' as a test for limiting free expression"). *See generally* Krislov, The Supreme Court and Political Freedom 89 (1968) ("effectively 'clear and present danger' has all but disappeared from the Court lexicon"); Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg--and Beyond,* 1969 Sup. Ct. Rev. 41 ("Hailed at the outset as the interpretational device for effective realization of First Amendment liberties, the danger test has lost favor to the point where the Court only irregularly admits to its employment, and there are few would would grieve

at its total demise").

470. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

471. Nowak & Rotunda, *supra* note 466, at 864.

472. *Id.* at 865. The *Brandenburg* standard has also been applied in the military context. In *Kiiskila v. Nichols,* 433 F.2d 745 (7th Cir. 1970), a civilian employed at the Fort Sheridan Military Reservation was barred from entering the installation after a search of her car at the gate revealed a large quantity of antiwar literature. The installation commander excluded her from the post because he concluded, based on her involvement in antiwar demonstrations off the installation and her possession of the literature, that whe would attempt to distribute the material in violation of a local military regulation which prohibited "picketing, demonstrations, sit-ins, protest marches, political speeches, and similar activities." Citing *Brandenburg,* the court noted that "[i]t is now well established. . .that constitutional guarantees of free speech and association do not permit the government to forbid or proscribe speech or other protected conduct unless that conduct is directed to inciting or producing imminent lawless action," and held that "protected first amendment conduct may not be considered in determining the likelihood that plaintiff will violate post regulations unless that conduct directly and imminently foreshadows proscribed on-the-base activity." *Id.* at 751.

473. *See* Ely, *supra* note 27, at 1482 (1975).

474. *See, e.g.,* S. Krislov, *supra* note 469, at 120 ("Most authorities have assumed that [the clear and present danger test] has been tacitly discarded").

475. 21 C.M.A. 564 (1972).

476. *Id.* at 571.

477. *Id.*

478. *Id.* at 572.

479. *See* Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977).

480. *Id.* at 1017.

481. *Id.*

482. *Id.* at 1018.

483. *Id.*

484. 424 U.S. 828 (1976).

485. 444 U.S. 348 (1980).

486. *See, e.g.,* Dash v. Commanding General, 429 F.2d 427 (4th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971); Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), *cert. denied,* 401 U.S. 982 (1971); Schneider v. Laird, 453 F.2d 345 (10th Cir. 1972).

487. Schneider v. Laird, 453 F.2d 345, 346 (10th Cir. 1972).

488. Greer v. Spock, 424 U.S. 828, 840 (1976).

489. Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1028-29 (8th Cir. 1982) (Heaney, J., dissenting).

490. P. Freund, The Supreme Court of the United States 44 (1961).

491. Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community,* 54 Tex. L. Rev. 42, 86 (1975).

492. S. Krislov, *supra* note 469, at 120.

493. P. Freund, *supra* note 490, at 43-44 (1961).

494. *Id.*

495. One commentator submits that the "clear danger" requirement found in military regulations such as DOD Dir. 1325.6 and AR 210-10 is the "substantial equivalent of 'clear and present danger.'" Neutze, *Yardsticks of Expression in the Military Environment,* 27 JAG Journal 180, 203 (1973). However, the adoption of the *Dennis* formulation of that standard in *Priest* undeniably minimizes the importance of the aspect of immediacy. Indeed, the "two assertedly distinctive elements in the *Dennis* fact pattern were (1) that the threatened government interest was overpowering and (2) that the nature of the interest was such that it would be foolish to force the government to stay its hand until there is a present danger of the occurrence of the ultimate, substantive evil." Imwinkelried & Zillman, *supra* note 79, at 80.

496. *But see* Imwinkelried & Zillman, *supra* note 79 , at 85. Professors Imwinkelried and Zillman argue that the Court will eventually opt for a standard whereby "the military may restrict abstract advocacy only when the class of speech clearly threatens military discipline," and they contend that this standard "seems to be well suited to the situation in which the government interest is an intangible such as the maintenance of military discipline." *Id.*

497. 417 U.S. 733 (1974).
498. *See* Hirschhorn, *supra* note 4, at 186; Imwinkelried & Zillman, *supra* note 79, at 70.
499. *See* Imwinkelried & Zillman, *supra* note 79, at 73.
500. Parker v. Levy, 417 U.S. 733, 761 (1974).
501. This conclusion is even more apparent when *Parker* is compared with Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) (per curiam). In that case, the Court cited its decision in *Parker* as dispositive of first amendment challenges to a court-martial conviction stemming from the appellee's attempt to publish a statement which "neither expressly nor impliedly counseled his intended addressees to commit illegal acts." Imwinkelried & Zillman, *supra* note 79, at 75. Instead, the speech under review in that case amounted to little more than ideological declarations which unquestionably would have been protected in another context. The "only possible rationalization for the result in *Avrech* is that, sub silentio, the majority decided to impose unique, novel restrictions on servicemen's free speech." *Id.* at 76.
502. 411 U.S. 677 (1973).
503. Act of Sept. 7, 1962, Pub. L. No. 87-649, 76 Stat. 469 (current version codified at 37 U.S.C. § 401 (1976).
504. *See, e.g.,* High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987) (court applied prevailing strict scrutiny standard in class action challenging Department of Defense policy of subjecting lesbian and gay applicants for secret and top secret industrial security clearances to expanded investigations); Sherwood v. Brown, 619 F.2d 47 (9th Cir.), *cert. denied,* 449 U.S. 919 (1980) (court applied prevailing strict scrutiny standard in reviewing Sikh's claim that military uniform regulation violated his first amendment free exercise rights); O'Neill v. Dent, 364 F. Supp. 565 (E.D. N.Y. 1973) (court applied strict scrutiny test in reviewing Merchant Marine Academy regulations preventing midshipmen from marrying while enrolled as students).
505. Ogden v. United States, 758 F.2d 1168, 1180 n.8 (7th Cir. 1985).
506. *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503, 516 (1986) (Brennan, J., dissenting) ("I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may

be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation"). Justice O'Connor would also use prevailing constitutional standards in assessing first amendment rights within the military, although her balancing of interests would take account of the military's special role. *See id.* at 531 (O'Connor, J., dissenting).

507. 444 U.S. 348 (1980).

508. *Id.* at 358.

509. *Id.* at 360.

510. *Id.* at 361.

511. *Id.* at 355.

512. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984). *See also* Courier Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987) (protective orders preventing media access to white supremist group's membership list discovered in civil rights suit did not violate first amendment).

513. *See, e.g.,* Bitterman v. Secretary of Defense, 553 F. Supp. 719 (D.C. Cir. 1982); Harris v. Kaine, 352 F. Supp. 769 (S.D. N.Y. 1972).

514. *See, e.g.,* Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985).

515. *See, e.g.,* United States v. Hayes, 11 M.J. 249 (CMA 1981).

516. *See, e.g.,* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983); Wood v. Ruppe, 659 F. Supp. 403 (D.D.C. 1987).

517. *See, e.g.,* Note, *supra* note 25, at 249.

518. Such a standard would parallel the Court's test for reviewing regulations which incidentally limit speech and its test for ascertaining whether commercial speech falls within first amendment protections. *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest") *with* Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (lawful and truthful commercial speech may be restricted by regulations which directly advance substantial governmental interests and are no more extensive than

necessary to serve that interest).

519. *See, e.g.,* Murray v. Haldeman, 16 M.J. 74, 79 (CMA 1983); United States v. Lockwood, 15 M.J. 1, 5 (CMA 1983); United States v. Sanford, 12 M.J. 170, 173-74 (CMA 1981); United States v. Middleton, 10 M.J. 123, 127 (CMA 1981); United States v. Mack, 9 M.J. 300, 328 (CMA 1980) (Cook, J., concurring in part and dissenting in part); United States v. Gay, 16 M.J. 586, 611 (AFCMR 1983) (Miller, J., dissenting); United States v. Vincent, 15 M.J. 613, 617 (NMCMR 1982) (May, J., concurring in part and dissenting in part); United States v. Scott, 13 M.J. 874, 876 (NMCMR 1982).

520. 330 U.S. 75 (1947).

521. *Id.* at 77.

522. *Id.* at 94.

523. *Id.* at 102-03.

524. *Id.* at 101. The Court subsequently reaffirmed this holding in Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) and United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

525. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 596-97 (1973) (Douglas, J., dissenting).

526. T. Emerson, *supra* note 57, at 587.

527. Brown v. Glines, 444 U.S. 348, 356 n.13 (1980).

528. Kukla v. Village of Antioch, 647 F. Supp. 799, 806 (N.D. Ill. 1986).

529. 425 U.S. 238 (1976).

530. *See, e.g.,* Kukla v. Village of Antioch, 647 F. Supp. 799, 809 (N.D. Ill. 1986) ("Given a police department's need for a high degree of discipline and morale, it may impose some kinds of restrictions on the personal freedoms of its employees where other government agencies could not"); McMullen v. Carson, 754 F.2d 936, 939-49 (11th Cir. 1985) ("The First Amendment does not protect personal behavior in the law enforcement context to the same extent that it does in other areas of Governmental concern"); Egger v. Phillips, 710 F.2d 292, 329 (7th Cir. 1983) (Coffey, J., concurring in part) ("Although cases dealing with the constitutional rights of military personnel are not controlling in this instance, many of the same considerations relevant in a military context are equally important to government law enforcement agencies"); Hughes v. Whitmer, 714 F.2d 1407,

1419 (8th Cir. 1983) ("While the military is distinguishable from the [Missouri State Highway] Patrol, we believe the same factors necessitating judicial deference to military decisions--the compelling need for decisive action, discipline and harmony in the ranks--counsel in favor of according deference to the Patrol's decision here").

531. Kelley v. Johnson, 425 U.S. 238, 241 (1976).

532. *Id.* at 245.

533. 330 U.S. 75 (1947).

534. Kelley v. Johnson, 425 U.S. 238, 248 (1976).

535. *See, e.g.,* Fugate v. Phoenix Civil Service Bd, 791 F.2d 736 (9th Cir. 1986).

536. *See, e.g.,* Everett v. Napper, 632 F. Supp. 1481, 1485 (N.D. Ga. 1986).

537. *See, e.g.,* Grusendorf v. City of Oklahoma, 816 F.2d 539 (10th Cir. 1987) (court assumed that fire-fighter trainees have liberty interest protecting their right to smoke cigarettes when off duty); Boyle v. Turnage, 798 F.2d 549, 552 (1st Cir. 1986) (court assumed that liberty interests of Veteran's Administration employees were infringed by training requirement which exposed employees to a one-second streamer burst of mace).

538. *See, e.g.,* Marshall v. District of Columbia, 559 F.2d 726 (D.C. Cir. 1977) (*Kelley* test applied to free exercise claim involving police appearance standards).

539. *See, e.g.,* Campbell v. Beaughler, 519 F.2d 1307 (9th Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); Klotzbach v. Callaway, 473 F. Supp. 1337 (W.D. N.Y. 1979).

540. *See, e.g.,* Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977); Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977).

541. Civil Action No. 78-17 (D.D.C. June 25, 1979).

542. 417 U.S. 733 (1974).

543. Civil Action No. 78-17 (D.D.C. June 25, 1979), at 16.

544. *Id.* slip op. at 18. *See generally* Folk, *Military Appearance Requirements and Free Exercise of Religion,* 98 Mil. L. Rev. 53, 84-85 (1982). In another case, the court declined to decise whther Kelley should be applied to free exercise claims raised in the context of military employment because, under the facts of that case, the military's rationale was deemed insufficient under any standard. *See* Geller v. Secretary of

Defense, 423 F. Supp 16 (D.D.C. 1976) (interest in instilling public confidence and maintaining neatness, cleanliness, and safety of airmen was insufficient to sustain military regulation prohibiting beards where plaintiff was employed as Jewish chaplain and wore beard without adverse action for seven years).

545. 453 U.S. 57 (1981).

546. 50 U.S.C. App. § 451 *et seq.* (1976).

547. Rostker v. Goldberg, 453 U.S. 57, 69 (1981).

548. In a dissenting opinion, Justice Marshall joined the Court in rejecting the Solicitor General's suggestion. *See id.,* at 87 n.3 (Marshall, J., dissenting).

549. *Id.* at 69-70.

550. *Id.* at 83.

551. *See, e.g.,* Goldman v. Secretary of Defense, 734 F.2d 1531, 1536 (D.D.C. 1984), *aff'd,* 475 U.S. 503 (1986).

552. *Id.*

553. *Id.*.

554. 755 F.2d 223 (2d Cir. 1985).

555. 403 U.S. 602 (1971).

556. Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

557. *See* Mack v. Rumsfeld, 609 F. Supp. 1561 (D.C. N.Y. 1985).

558. *See* Cobb v. United States Merchant Marine Academy, 592 F. Supp. 640 (E.D. N.Y. 1984).

559. 17 U.S. (4 Wheat.) 316 (1819).

560. 389 U.S. 258 (1967).

561. 50 U.S.C. § 784(a)(1)(D) (1950).

562. United States v. Robel, 389 U.S. 258, 268 n.20 (1967). One commentator has concluded that Chief Justice Marshall's standard of review in *McCulloch* should be applied in reviewing constitutional issues arising from the military. Hirschhorn, *supra* note 4, at 246-47. As Professor Hirschhorn explains, "[i]n part because of the technical problems involved in reviewing the substance of military discipline, but primarily because of the consequences of judicial error in the individual's favor, the courts should not find military departures from civilian standards of individual rights within the armed forces to be unconstitutional unless manifestly irrational

in terms of successful military performance." *Id.* Professor Hirschhorn also argues that "[i]rrationality. . .takes distinctly different forms with respect to practices generated by the armed forces themselves, using delegated authority, and those initiated or clearly ratified by Congress;" under his proposal "the burden of persuasion would remain on the serviceman [but] the armed forces would have to provide a rational articulation of the usefulness of the practice." *Id.*

563. United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

564. 475 U.S. 503 (1986).

565. *Id.* at 507.

566. *Id.* at 509.

567. *Id.* at 510.

568. *See* Folk, *supra* note 544, at 84.

569. *See* Madyun v. Franzen, 704 F.2d 954, 959 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 493 (1987).

570. Folk, *The Military, Religion, and Judicial Review: The Supreme Court's Decision in Goldman v. Weinberger,* The Army Lawyer, Nov. 1986, at 9.

571. Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting).

572. Empire Kosher Poultry v. Hallowell, 816 F.2d 907, 912 (3d Cir. 1987).

573. See, e.g., High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987).

574. *See generally* Buchanan, *Toward a Unified Theory of Governmental Power to Regulate Protected Speech,* 18 Conn. L. Rev. 531 (1986).

575. Vance v. United States, 434 F. Supp. 826, 834 (N.D. Tex. 1977).

576. *Id.*

577. Goldman v. Weinberger, 475 U.S. 503, 510 (1986).